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CONTAINING

A SELECTION OF CASES AFFECTING RAILWAYS RECENTLY DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, THE SUPREME COURT AND THE EXCHEQUER COURT OF CANADA, AND THE COURTS OF THE PROVINCES OF CANADA, INCLUDING DECISIONS OF THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA, PUBLISHED BY AUTHORITY OF THE BOARD, WITH NOTES AND COMMENTS.

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RUTTER STATION PATRONS v. CANADIAN PACIFIC R. CO.

(File No. 17241.)

Rutter Station Case.

Board of Railway Commissioners. January 16, 1912.

1. REGULAR AND FLAG STATIONS—AGENT—ACCOMMODATION—CARETAKER.

After stations with regular equipment had been maintained at French and Rutter, six miles apart, from 1908 to 1911, Rutter was made a flag station, part of the business was transferred to French, the agent removed and a night operator left in his place.

Upon complaint by residents (representing that a population of 2,500 was dependent upon the station) the Board upon the report of its inspector ordered the railway company

(1) to keep a caretaker at the station to look after freight, express and mail matter, at the station from 7 a.m. to 6 p.m. daily except Sunday.

(2) to see that its conductors sold tickets to people boarding trains at Rutter, and their baggage checked without charge, and condemned the practice of leaving freight and express matter in open sheds at flag stations.

Per Mr. Commissioner McLean.

(1) the railway company had not justified the removal of the agent.

(2) the general policy laid down in the Flag Station case, 8 Can. Ry. Cas. 151, has not been modified.

(3) by order No. 6242 railway companies are released from liability for goods unloaded at flag stations where there is no agent.

January 16, 1912. MR. COMMISSIONER MILLS:—Rutter is a station on the Canadian Pacific Railway (Sudbury Branch) about 37 miles south of Sudbury and 6 miles south of French, another station on the same line. Rutter and French have all the equipment of regular stations—waiting-rooms, rooms for telegraph operators, freight sheds, platforms, etc.

When the line was opened for traffic in 1908—an agent was placed in charge of Rutter station and the business thereat; and all seemed well, till an agent was installed at French to look after the shipping from a sawmill and attend to other business in that locality. Then some of the Rutter business was transferred to French; and on the 1st May, 1911, the Company removed its agent from Rutter, made Rutter a flag station, and arranged to

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keep a telegraph operator there at night to look after its night train-service.

In anticipation of the change at Rutter, 160 petitioners of Monetteville, Cosby, and Rutter,—professing to represent a population of about 2,500 people who are dependent on the station at Rutter, being cut off from French by the French river, which runs between the two stations,—appealed to the Board on the 22nd of April, 1911, against the removal of the agent from Rutter, alleging that a large (or at least a very considerable) amount of passenger, freight, and express business was done at Rutter; that the mail for five post offices in the district was regularly delivered at Rutter; and that the removal of the agent from that station would cause great inconvenience to a large number of people (over 250 families) and involve the business portion of the community in serious loss from the exposure of goods, night and day, in open sheds, to the depredations of thieves who would be at liberty to steal without the slightest risk of detection.

In response to the appeal of the petitioners, the Board sent one of its inspectors to make careful inquiry as to the facts, circumstances, and conditions at the station in question; and the following are extracts from his report, made on the 22nd December, 1911:—

"On my arrival at Rutter, on the 19th December, 1911, I found the freight shed nearly full of freight of various kinds; both the side and end doors were wide open to any person wishing to remove the freight; and no person was in charge. On the morning of December the 20th, I called at the station and found several teams being loaded, every person picking out his own material."

"I noticed an empty chocolate pail, addressed to T. N. Desmarais, the contents of which had all been removed by unknown persons. There was also a barrel of syrup from which the head and over half of the contents had been removed; and what was left was mixed with dust and dirt which had fallen into the barrel, making the remainder of the contents unfit for use. The following is a list of beer and liquor missing from a shipment addressed to N. Perron, a hotelkeeper at Cosby: 14 bottles of porter missing, November 7th; 20 bottles of beer missing, same date; 3 bottles of Scotch whiskey, 1 bottle of brandy, and 7 pint-flasks of whiskey missing, 24th November. And Mr. Desmarais informed me that last fall 2 pails of chocolates, 6 pounds of figs,

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and 3 barrels of apples shipped to him, were stolen before he was aware that the goods had arrived. Nearly every person that I called on had a similar complaint to make regarding the stealing of goods."

"I hired a team and drove to Noelville, which is 14 miles east; and while en route to this point I met 29 teams drawing hay to be shipped from Rutter. I found that Noelville and the surroundings had about 250 families. Mr. Desmarais has quite a large general store and is doing a business of over $40,000 a year. There are a couple of other small stores and a custom sawmill. When returning to Rutter, I met 14 teams heavily loaded with merchandise on their way from Rutter station. There were also three teams at the freight shed loading freight for Noelville, and two other teams unloading freight from box cars."

"The night operator has nothing to do with the freight shed or receiving and delivering freight, selling tickets, or checking baggage."

"The night I was there 18 or 20 passengers boarded train No. 25 for Sudbury and points west of Sudbury, and also for North Bay and other points east, without tickets or having their baggage checked."

"The railway company has added over 20 feet to its freight shed, which would seem to shew that the business at Rutter is increasing."

"There should be a better roadway to the freight shed. It would require only two or three cars of ballast or cinders to fill a hole which is opposite the west door of the shed. The place in question is fairly good at the present time, on account of its being frozen; but I was informed by teamsters that in spring and fall it is almost impossible to get to the freight shed on account of the mud."

From a statement furnished, it appears that the revenue from freight and passenger traffic at Rutter station was $4,492.76 for the year ending the 31st of May, 1911. No doubt the earnings in June, July, August, and September are small, but they are very considerable in the winter and spring months; so, counting the freight and passenger traffic and the amounts paid by the Express Company and the Government for express and mail services during the year, we have a sum which, we are informed, is

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larger than the total revenue from each of several regular stations in the central and eastern provinces of the Dominion.

So much we may say regarding the matter of revenue—admittedly a very important matter, a matter which must always be carefully considered; but, whatever the revenue from any particular station may be, I think the time has come for putting an end to the practice of placing goods in open sheds, at flag stations or anywhere else, to be stolen as above, or throwing them on the ground and leaving them (as they are often left) exposed to rain, snow, and thieves. The practice is, to my mind, clearly indefensible, and should be stopped at the earliest practicable date.

There are remedies—reasonably cheap and effective remedies—for overcoming the difficulties which arise in the handling of traffic at flag stations. A remedy has been found by the great Pennsylvania Railroad Company in the United States. A remedy can be found in Canada; and my opinion, concurred in by the Chief Operating Officer of the Board, is that, in this case, upon the evidence, some given orally and some submitted in writing, an order should go directing the Canadian Pacific Railway Company to keep a caretaker attendant at Rutter station, on its line of railway to receive, protect, and deliver freight, express goods, and mail bags, between the hours of seven a.m. and six p.m., daily, except Sundays,—under such control and direction as the said Company may think proper; and to see that its conductors sell tickets to people who get upon trains at the said station (single and return tickets) and have their baggage checked, without any extra charge.

Further, I think the Company should be requested to improve the road to the freight shed, as suggested by the Inspector.

The Chief Commissioner and the Assistant Chief Commissioner concurred with Mr. Commissioner Mills.

January 18, 1912. MR. COMMISSIONER MCLEAN, dissenting in part:—I agree to the disposition recommended, understanding that, while the wording of the reasons for judgment would seem to import wider considerations, we are concerned simply with a particular case. The situation is that the railway established this station and provided an agent. It has not made an affirmative shewing that the removal of an agent, or of an official performing at least in part the duties of such an agent, is justifiable.

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Reference is made in the reasons for judgment to the method of caring for freight at flag stations; and I infer that the reference is to flag stations where no order has been given by the Board as to the installation of an agent. But this, it seems to me, is concerned with a situation entirely distinct from that before us, where the Board is not concerned with the installation of an agent *ab initio*. So far as the caring for freight at flag stations is concerned, the Board has, after due consideration, set out a general policy, which, while it may be a matter for modification, has not yet been modified. The Board in its decision in the Flag Station case, 8 Can. Ry. Cas. 151, recognized that, subject to the limitations set out therein, as well as in the flag station order, the companies should not be called upon to appoint caretakers at flag stations. Further, the Board has also recognized, in its Order No. 6242, the justifiability of the railway releasing itself from liability for loss and damage occurring to property after it has been unloaded at a flag station at which there is no agent.

WYLIE MILLING CO. v. CANADIAN PACIFIC AND KINGSTON AND PEMBROKE R. COS.

(File No. 1179.7.)

Board of Railway Commissioners. February 15, 1912.

1. COMPANY, MAJORITY OF STOCK IN ANOTHER COMPANY—SEPARATE CORPORATIONS AND OFFICERS—UNIT IN CONTROL—FIXING RATES.

Where one railway company owning 51 per cent. of its stock has *de facto* control of another railway company, although they are separate corporations with a separate set of officers, the two companies for the purpose of fixing rates, should be treated as one company.

THE application was heard at Ottawa, October 17, 1911.

W. H. Stafford, for the Applicant.

E. W. Beatty, for the Respondents.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

February 15, 1912. ASSISTANT CHIEF COMMISSIONER:—The Wylie Milling Company has a flour mill at Almonte, Ontario. It gets grain in ex-lakes from Kingston over the Kingston and Pembroke Railway at Sharbot Lake, and thence on the Canadian Pacific Railway, via Smith's Falls and Carleton, to Almonte, where it is milled and then forwarded to Montreal.

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The rate from Kingston to Montreal, with stop-over for milling at Almonte, at one time was 15½ cents per 100 lbs. It was then reduced to 13¼ cents per 100 lbs. by the Company, and at the hearing Mr. Beatty, counsel for the Company, suggested it should be made 12¾ cents. That rate he made up as follows:

Kingston and Pembroke	3 cts.	47 miles	
Canadian Pacific	6½ cts.	171 "	Sharbot Lake to Montreal.
Stop-over for Milling	2 cts.		
Side haul to Almonte	1¼ cts.		
	12¾ cts.		

It will be observed that in computing this rate counsel for the railway companies treats the Kingston and Pembroke Railway Company and the Canadian Pacific Railway Company as two separate roads. It was admitted by counsel for the Companies that the Canadian Pacific Railway Company owned 51 per cent. of the stock of the Kingston and Pembroke Railway Company. Counsel for the Companies submitted that as the two Companies were separate corporations, with a separate set of officers, that they should be treated separately, and that each one was entitled to its rate.

In a memorandum prepared by Mr. Comissioner Mills, dated October 19th, 1911, he deals with the question of the Canadian Pacific Railway Company's control of the Kingston and Pembroke Railway Company as follows:—

"On the facts stated in this complaint, the written answer submitted by the Canadian Pacific Railway Company, and the evidence given at the hearing of the case, it is clear to me that the Canadian Pacific, as the owner of 51 per cent. of the stock of the Kingston and Pembroke Railway has *de facto* control of the latter railway. It has the essence and all the advantages of formally complete control; and the fact that the consequences of the said control, are not specifically set forth in a lease or other document, is a mere incident, and does not nullify the control or exclude the benefits and obligations which result therefrom.

"Judging from the character and traffic of the Kingston and Pembroke Railway, I think we are safe in assuming that the purchase by the Canadian Pacific Railway Company of a majority interest in the stock of the said Kingston and Pembroke road, was

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made, not with a view to a directly remunerative investment, but to secure certain advantages which it was thought would accrue from control of the rates and operation of the said Kingston and Pembroke Railway; and the company which secured and enjoys the advantages, great or small, resulting from control, should, according to the usual practice, discharge the obligations growing out of such control.

"Therefore, we are, in my opinion, logically forced to the conclusion that the Kingston and Pembroke Railway should be considered a part, and treated as a part, of the Canadian Pacific Railway System; and that the complaint in this case should be disposed of in accordance with this conclusion."

I agree with the conclusion arrived at by Mr. Commissioner Mills in his memorandum of October 19th last, that for the purpose of freight rates the Kingston and Pembroke Railway Company should be considered as part of the Canadian Pacific Railway System.

This conclusion is strengthened by a decision of the Interstate Commerce Commission in *Carl Eichenberg* v. *Southern Pacific Company et al.*, 14 I.C.C.R. 250. The material points in this decision as summarized in the head-notes are:—

"1. The railroad and steamship lines forming the so-called Southern Pacific System are one in control and operation, are owned by the Southern Pacific Company, and are identical in officers and interests; and that as the Terminal Company was organized to furnish terminal facilities for the Southern Pacific System at Galveston, and through shipments on the system lines pass and repass over the docks of the Terminal Company, the latter forms a necessary link in the chain of interstate commerce and is subject to the Act.

"2. It makes no difference whether or not a connecting railroad company owns the Terminal Company, if the ownership of both is invested in the same corporation.

"3. In finding that the Terminal Company was part and parcel of the system engaged as a whole in the transportation of commerce, the Commission stated that to hold otherwise would in effect permit carriers generally through the organization of separate corporations to exempt all their terminals and terminal facilities from the regulating authority of the Commission.

"4. The Commission stated that it was not concluded by the form, but looks to the substance of the relations between corporations engaged in interstate commerce, and it therefore found

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that the Terminal Company, which was doing a wharfage business was a necessary element in and facility of interstate transportation in which the Southern Pacific System was engaged."

Having come to the conclusion that for the purpose of this case the two roads should be treated as one, the fixing of the rate presents no difficulty.

In the Richardson complaint, the Board decided that 7 cents was a fair rate on ex-lake grain, Kingston to Montreal. That was on the Grand Trunk Railway Company's mileage of 176. The distance to Montreal from Kingston, via Sharbot Lake, over the Kingston and Pembroke Railway and the Canadian Pacific Railway is 218. Giving the Railway Companies the benefit of the longer mileage it would make the rate to Montreal approximately 7½ cents. Adding to this 1¼ cents for the side haul, Smith's Falls to Almonte and return at the usual side haul rate of ½ a cent per ton per mile, and 2 cents the usual milling stopover, makes a total rate for the serviee rendered of 10¾ cents per 100 pounds.

I suggest, therefore, that an order go directing the Canadian Pacific Railway Company and the Kingston and Pembroke Railway Company to file tariffs within thirty (30) days establishing the 10¾ cent rate above mentioned.

MR. COMMISSIONER MCLEAN concurred.

WYLIE MILLING CO. v. CANADIAN PACIFIC R. CO.

(File No. 1179.7.)

Board of Railway Commissioners. February 27, 1912.

1. UNJUST DISCRIMINATION—SIDE-HAUL TOLL.

It is not unjust discrimination for a railway company to charge a side-haul toll to points where there is no competition, although no such toll is charged to points where competition exists.

THE application was heard at Ottawa, October 17, 1911.

W. H. Stafford, for the Applicants.

E. W. Beatty, for the Respondent.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

February 27, 1912. ASSISTANT CHIEF COMMISSIONER:—The complaint of the Wylie Milling Company with reference to the

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rate on ex-lake grain, Kingston to Montreal, with stop-over at Almonte, was disposed of in my memorandum of 15th instant.

There still remains another matter raised by the Milling Company, *i.e.*, that the rate from Georgian Bay ports to Montreal with milling stop-over at Almonte is 1¼ cents higher when milling is done at Almonte than the rate via Arnprior, Renfrew, Douglas, and Eganville. The ex-lake rate from all Georgian Bay ports, both Canadian Pacific and Grand Trunk, to Montreal, is 10 cents per 100 lbs., with a milling-in-transit stop-over of 2 cents additional on the direct run. The tariffs provide that, where a side-haul to reach a milling point is necessary an additional charge of ½ cent per ton per mile is made. This side-haul charge from Smith's Falls to Almonte constitutes the extra cent and one-quarter which the Milling Company complain of. The Canadian Pacific Railway have a side-haul to Arnprior, Renfrew, Douglas, and Eganville, but they do not make any extra side-haul charge to those points. The reason is that those four points being on the Grand Trunk line from Depot Harbour to Montreal the Canadian Pacific must meet the Grand Trunk rate of ten and two in order to get any business. This, of course, is quite justifiable.

The side-haul charge made in the case of Almonte is the usual charge for such service, and the Railway Company is justified in making it in the case of Almonte.

If the Canadian Pacific Railway withdrew from competing with the Grand Trunk at Arnprior, Renfrew, Douglas, and Eganville, the Wylie Milling Company would be no better off because the rate through Almonte would not be changed and the millers at Arnprior, Renfrew, Douglas, and Eganville would doubtless ship their grain and grain products solely via the Grand Trunk at the rates they are now paying.

The reasonableness of the 10-cent rate from the Bay to Montreal or the extra side-haul charge of a half-a-cent per ton per mile has not been questioned in this matter, but merely the application of these rates as set out above.

I, therefore, think that this feature of the Wylie Milling Company's application should be dismissed.

COMMISSIONERS MILLS and MCLEAN concurred.

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THE VILLAGE OF BRIDGEBURG v. GRAND TRUNK AND MICHIGAN CENTRAL R. COS.

(File No. 18046.)

Board of Railway Commissioners. February 29, 1912.

1. RAILWAYS CROSSED BY HIGHWAY—COST OF OVERHEAD BRIDGE—MUNICIPALITY—NO COMPENSATION FOR EASEMENT.

Leave was granted by the Board to a municipality to carry a highway over the right of way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right of way, with right of support by piers without payment of compensation to the railway companies.

THE application was heard at Hamilton, January 27, 1912.

G. H. Pettit, for the Applicant.
W. E. Foster, for the Grand Trunk Ry. Co.
W. P. Torrance, for the Michigan Central Ry. Co.

The facts are fully set out in the judgment of the Chief Commissioner.

February 29, 1912. THE LATE CHIEF COMMISSIONER (Hon. Mr. Mabee) :—The corporation of theVillage of Bridgeburg asks for authority to carry a street over the right-of-way and tracks of the Grand Trunk and Michigan Central Railways, by means of an overhead bridge. The work is one of necessity, as the public are put to great inconvenience under present conditions; and the development of the place is being retarded.

The Board visited the locality, and carefully examined the local conditions.

The Village should be granted permission to do the work, and detail plans must be filed for the approval of the Chief Engineer.

It is impossible to direct either railway company to contribute towards the expense of the work. It is entirely for the convenience of the people there. No highway at present exists at or near the point in question, and all the Board can do is to give the village an easement over the right-of-way of both companies, with the right to locate piers at proper places, without payment of compensation.

It was said that this work would be of advantage to the companies, in that, for years, large numbers of persons have crossed and recrossed the companies' lands on foot, in the vicin-

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ity of where the bridge would be located, and the latter would relieve the companies from these trespassers. I am afraid it would be rather hard doctrine to invoke, that, because the companies have not in the past prosecuted trespassers, they should now be called upon to pay for works to keep these trespassers off their property.

The Board's Engineer will see that the piers are so located that the least inconvenience will be done to the companies, having regard, as well, to future development.

MR. COMISSIONER MILLS concurred.

MUNICIPALITY OF NUTANA v. CANADIAN NORTHERN R. CO.
(File No. 9994.51.)

Board of Railway Commissioners. March 20, 1912.

1. RIGHT OF WAY FENCES—DEFAULT—PENALTY—RAILWAY ACT, SEC. 254.

Where a railway was built and not fenced for many years through a thickly settled, highly cultivated and rich agricultural district, the Board ordered the right of way to be fenced by the railway company under section 254 of the Railway Act, and imposed a penalty of $50 a day for each day's default after the time specified in its order.

[*In re Board of Railway Commissioners and Canadian Northern Ry. Co.* (*Fencing Case*), 42 S.C.R. 143, 10 Can. Ry. Cas. 104, followed.]

THE application was heard at Saskatoon, March 20, 1912.

M. Cameron, for the Applicant.
O. H. Clark, K.C., for the Respondent.

The facts are fully set out in the oral judgment of the Chief Commissioner delivered at the close of the hearing.

THE LATE CHIEF COMMISSIONER (Hon. Mr. Mabee):—Two or three years ago, upon the complaint of a large number of municipalities in Manitoba and Saskatchewan, and after hearings at a number of cities in those Provinces, and after having received complaints innumerable from farmers and settlers whose cattle and horses and stock had been killed upon the railways, where the rights-of-way were unfenced, we made an order requiring the railway companies to fence the unfenced portions of their rights-of-way in these Provinces on or before a fixed date. The railway companies, or some of them, appealed to the Supreme Court, and the Supreme Court held that we had exceeded our jurisdiction in making a general order of that character, and that we should have confined the order to some specific locality.

Now, we have a complaint here of a specific locality that is

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unfenced. We all know that this road has been built for many years; that it goes through a thickly settled, highly cultivated, and rich agricultural district; and that it is a section of country through which a railway should have been fenced long ago.

In this case, an order will go that the Canadian Northern Railway Company fence all of the unfenced portion of the right-of-way along the Qu'Appelle, Long Lake & Saskatchewan Railway, between Saskatoon and Regina; on or before the first day of November, 1912; that these fences shall be of the character and description described in the Railway Act, namely, fences of the character that will turn cattle and other animals; and that, for every day's default, if any, after the first day of November, 1912, the company shall be assessed the sum of fifty dollars per day by way of a penalty.

Re GRAND TRUNK PACIFIC BRANCH LINES CO.

(File No. 10821.70.)

Board of Railway Commissioners. March 20, 1912.

1. CARRIERS (§ IV A—519)—BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—WORKS CONSTRUCTED AFTER DECEMBER 31, 1909—RAILWAY ACT, SEC. 137—9 & 10 EDW. VII. CH. 50, SEC. 2.

The Board has no jurisdiction to approve of works constructed without its leave subsequent to December 31, 1909. The statute 9 & 10 Edw. VII. (Can.) ch. 50, sec. 2, does not apply to works constructed after that date.

THE application was heard at Saskatoon, March 20, 1912.

Mr. Zimmerman, for the Applicant Company.

The facts are fully set out in the oral judgment of the Chief Commissioner delivered at the close of the hearing.

THE LATE CHIEF COMMISSIONER (Hon. Mr. Mabee):—We have held repeatedly, and it was recognized by a statute passed two or three yeares ago, that where the law requires a railway company to obtain the authority of the Board, or the sanction of the Board, before the construction of a work, or locating a building, or a station of that kind, and it has not obtained that authority, and constructs the work, the Board has no jurisdiction to approve of it after it has been done. That was recognized. We held that over and over again, and Parliament gave us authority to approve of work that had been constructed in contravention of the statute prior to the end of the year 1909. We approved of hundreds of works under that provision.

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We have no authority to approve of works that have been built in contravention of the Act, subsequent to the above date.

PHEASANT POINT FARMERS v. CANADIAN PACIFIC R. CO.

(File No. 19239.)

Board of Railway Commissioners. March 25, 1912.

1. CONSTRUCTION OF SIDING—BREAK IN MAIN LINE—ADDITIONAL DANGER AND LIABILITY TO ACCIDENT—GREATER INCONVENIENCE THAN CONVENIENCE.

The Board will not order railway companies to put in sidings every three or four miles between stations six or seven miles apart.

THE application was heard at Winnipeg, March 25, 1912.

H. W. Menzies, for the Applicants.
W. H. Curle, for the Respondent.

The facts are fully set out in the oral judgment of the Chief Commissioner delivered at the close of the hearing.

THE LATE CHIEF COMMISSIONER (Hon. Mr. Mabee):—I am afraid in this matter we cannot make any order. It, no doubt, would be a convenience to these gentlement to have this siding. It would save them a certain distance in hauling out their grain. They are also laboring, apparently, under a drawback because of the hilly nature of the country. But, there are other features that preponderate. Some six or seven miles apart is generally the limit of stations. That leaves perhaps three or four miles as the farthest anybody has to draw.

If these people could get this siding, they would save two or three miles in drawing out their grain; but if we required one railway company to put in a siding between two stations where the sidings would be within three miles or thereabouts of a station, we would have to apply the same principle to all railway companies; and if we granted the request of these gentlemen, we would have to grant the request of others under similar circumstances.

It does not seem to us good practice or good policy. Every break in the main line is an additional danger and an additional liability to accident, and so on. It should not be permitted or required unless for the gravest reasons.

In this case, these gentlemen only have about three miles farther than if they had the siding at this point. It would never

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do to require companies to put in sidings every three or four miles along their railway line. It would, probably, in the end, bring about greater inconvenience than it would convenience.

We will have to refuse this petition.

BELL TELEPHONE CO. v. CANADIAN PACIFIC R. CO., GRAND TRUNK R. CO. and CITY OF TORONTO.

Brock Avenue Subway Case.
(File No. 19486.)

Board of Railway Commissioners. May 24, 1912.

1. TELEPHONES (§ I—5)—INSTALLATION IN SUBWAY—GRADE SEPARATION AT RAILWAY CROSSING.

Where a grade separation has been ordered and a city street is lowered in the public interest, so as to go under the railway line by subway, a telephone company having overhead wires on the street is not entitled to receive compensation from the railway or the municipality for the expense of moving and re-locating the telephone line.

APPLICATION of the Bell Telephone Company of Canada respecting crossing over the Canadian Pacific Railway and Grand Trunk Railway at Brock avenue, Toronto, Ont.

The application was heard at Toronto, May 24, 1912.

M. K. Cowan, K.C., for the Applicant.
Angus MacMurchy, K.C., for the Canadian Pacific Ry. Co.
W. H. Biggar, K.C., for the Grand Trunk Ry. Co.

The judgment of the Board was delivered by the Assistant Chief Commissioner at the close of the hearing.

ASSISTANT CHIEF COMMISSIONER:—We are unanimously of the opinion that while the Bell Telephone Company has the right to be on the highway, still it must bear the burden of the changing of the highway when we order it for the public good. A grade separation has been ordered at Brock Avenue, and the burden of it has, we think, been properly apportioned between the railways and the city, and it now appears that some burden is placed on the Bell Telephone Company. Well, they will have to bear it for the public good. That is the only way to look at it. The city and the railways are going to considerable expense in constructing this subway and it is not unreasonable to expect the Telephone Company to hear the cost of any change in its wires made necessary by the change in the street. Tehrefore, this application is refused.

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KELLY v. GRAND TRUNK PACIFIC RY. CO.

(File No. 18787.)

Hazelton, B.C., Townsite Case.

Board of Railway Commissioners. June 10, 1912.

1. STATION—LOCATION OF—CHANGE IN—CONTRACT.

After approving the location of a station upon a certain lot the Board will not approve another location of the same station upon a different lot when the railway company has refused to carry out its original contract with the owner of the first lot.

2. CARRIERS (§ IV D—551)—GOVERNMENTAL REGULATION—RAILWAY BOARD COMMISSION—LOCATION OF STATION.

The Board of Railway Commissioners, on fixing the location for a railway station on the Transcontinental Railway at one of two conflicting sites proposed by representatives of settlements closely situated to each other and bearing similar names, will not restrain the location of a second station at the other site on the application of the railway on a case for additional facilities being made out.

December 19, 1911. THE LATE CHIEF COMMISSIONER (Hon. Mr. Mabee):—We are all of one opinion with reference to this matter. The Grand Trunk Pacific, in filing its location plan, which was approved by the Board, located station grounds on lot 882. That plan was approved shewing that location as a station ground.

Later on it entered into negotiation with the then owner of lot 882, and some considerable correspondence has taken place between them, to all of which it is not necessary to refer, but one letter to the predecessor in title of this applicant, dated 20th June, 1910, states that it has been decided to reduce the area of the right of way *and station grounds* through lot 882, so that there will be 29.08 acres as shewn on the accompanying blue print. That is from the Land Commissioner to Mr. Wheeler, shewing that the Land Commissioner was negotiating with Wheeler for the conveyance of a right-of-way through lot 882 and enough land in connection with the right-of-way to establish *station grounds* at that point. They took a conveyance from Wheeler for the amount of land required for right-of-way and *station grounds,* and later on commenced to negotiate with Wheeler with reference to exploiting a townsite at that point. A clause in the letter that I have just referred to, of the 20th of June, is as follows: "Please say whether you would like to join with the company in a townsite at this point."

It is now suggested that all that they were dealing about was sufficient land to put a siding in. It is idle to say, in the light

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of this correspondence, that there was no other object in view except the getting of enough ground for siding purposes; whoever would think of locating a townsite at a siding without any station facilities?

Apparently the railway company was unable to get from the owner of the property a conveyance, as they were requesting, of a half interest in the land for a townsite.

Later on the company decided to locate a station at some other point. The Counsel for the Grand Trunk Pacific says that he does not know whether they obtained from the owners of lot 851, to which they were proposing to move their station, a conveyance of the land there for a townsite, but in a copy of the Daily News-Advertiser, dated 15th November, the Grand Trunk Pacific is advertising for sale the land for a townsite on lot 851. So no doubt they succeeded in getting from the owner of lot 851 what the owner of lot 882 refused to give them, and it does not require much knowledge of these affairs to justify the conclusion that that, and that alone, was the moving cause in changing the location of the station, or at least in attempting to change the location of the station from lot 882 to lot 851.

In connection with the advertisement that has been referred to and which is apparently made an exhibit to an affidavit of Mr. Kelly's in some proceedings in the British Columbia Supreme Court, there is a letter from the Land Commissioner dated the 6th of November. It is headed "Notice to the Public," given out of course for the purpose of assisting in the disposal of lots at this point. "The Grand Trunk Pacific townsite South Hazelton is situated on lot 851 and it is the intention of the company to build a station on this townsite in the spring of 1912."

On the face of that a letter is presented to us from the General Manager of the railway in which he expresses the idea that this matter would hardly be considered seriously by the Commission; that there was no railway, I think it was said, within 100 miles of this point.

It seems to me that this man with whom this contract was made, and whose lands the railway company obtained for the location of a station on lot 882, is in no way proceeding with haste when he discovers that the company in effect repudiate their agreement, and are advertising the lands for sale in a townsite in competition with what I presume he is trying to exploit on lot 882, and on which they promise the public that a

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station will be built in the spring of 1912, within three or four months.

Now it is perfectly apparent that there is only one thing to be done in this case. This Company has got to carry out its agreement. It is a public scandal that a railway corporation should go about the country and obtain conveyances of this kind under false pretences. If a private individual had done what this Company through its officials have done, he would probably be landed in the penitentiary. At any rate he ought to be in the penitentiary. The land was obtained through the grossest deceit on the part of the representatives of this Company, and it is a breach of faith of the worst character that they should attempt to repudiate their contract. It is true the time is not yet ripe for the construction of a station. The road is not built. It is not ready to open for traffic, but an order may go requiring the Grand Trunk Pacific Railway Company to construct and have ready for use by the public, a station (the plans to be filed and approved by the Board's engineer) on lot 882, where it was intended originally to construct it. That station must be ready for operation at least as soon as the road is open for traffic.

An order may also go refusing the application that was filed with the Board on the 11th of December for the location of station grounds and a station on lot 851, and restraining the Grand Trunk Pacific Railway Company from the location of a station at that point. It is out of line with what they originally intended to do, done with bad motives, and it is done in violation of their solemn contract with the predecessor of Kelly in title.

APPLICATION of Robert Kelly, for an order approving of the location of station to be constructed by the Grand Trunk Pacific Railway, on lot 882, group 1, Cassiar District, B.C., and restraining the location of any station on lot 851, group 1, Cassiar District; and application of the Grand Trunk Pacific Railway for approval of location of station grounds and station on lot 851, group 1, Cassiar District, B.C.

MR. COMMISSIONER MCLEAN:—By the Board's order No. 15727 of December 19th, 1911, the railway company was ordered to provide and construct a station on lot 882, group 1, in the Cassiar District of British Columbia. The application of the railway for the approval of the location of station grounds and station on lot 851, group 1, Cassiar District of the Province of British Columbia, was in terms of the said order, refused, and

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the railway company was restrained by said order from locating a station at that point.

Subsequently, on the petition of the Grand Trunk Pacific Railway Company, the matter was taken before the Governor-in-Council, and as a result of the hearing the Governor-in-Council issued an order in the matter rescinding the order of the Board above referred to, and stating,—

> it was made to appear that several different interests directly affected by the location of the stations in question had not had as full opportunity to set forth their respective views as would seem just and desirable and that therefore in their judgment the aforesaid applications of Robert Kelly and of the Grand Trunk Pacific Railway Company should be remitted to the Board of Railway Commissioners for Canada for reconsideration and that all parties interested in the matter of the said applications should have leave to make such further application to the Board of Railway Commissioners for Canada as they might be advised.

Following this the order of the Governor-in-Council remitted the matter to the Board stating that it was,—

> for reconsideration and that all parties interested in the matter of the said applications have leave to make such further application to the Board of Railway Commissioners for Canada as they may be advised.

The matter was heard at length by the Board from June 4th until June 6th. A large amount of material was submitted; the exact value of much of this from the standpoint of evidence is more than questionable. It was not, however, to be expected that, in a section which has not as yet experienced the advantages of railway development, the views expressed as to the effects of the railway development in connection with the question of station sites, could be other than speculative.

As to the provision of the original order requiring the location of a station on lot 882, after careful consideration I am unable to see that this should be varied. The views expressed by the late Chief Commissioner in his judgment are as pertinent to the location of this station now as when uttered. It is a situation which the railway has created for itself, and for the Board to assent to the modification of this term of the order would make it an assenting party to a vital injustice.

In the original hearing the views of the residents of the present town of Hazelton were not to any extent before us; nor was there developed in the record the way in which their in-

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terests from the standpoint of traffic convenience were affected by the Board's restraining the railway company from building on lot 851. It may be said parenthetically that it appeared in the re-hearing that the proposed station was actually to be placed on lot 9 instead of on lot 851. This confusion may have arisen from the fact that the station grounds extend on to lot 851. However, this is mentioned not because it has any material bearing upon the original order, but because the statement is necessary to correctness.

A considerable amount of evidence and opinion was presented in the re-hearing in regard to the highway methods of approach to the proposed station on lot 882, and the proposed station on lot 9 spoken of as South Hazelton. Statements were submitted as to the cost of bridging the Bulkley river. There were also expressions of opinion as to the intention of the Provincial Government in this respect. These expressions were not, however, sufficiently definite to permit one to form any conclusion as to where the bridges, if built, would ultimately be built by the Provincial Government or where the highways would be located.

It appears from the evidence of the representatives of the present town of Hazelton that some point nearer to them than the location on lot 882 would be of greater convenience to them from a traffic standpoint. It also appears that at the present town of Hazelton there is now the convenience of water transportation, and that it is desired that in the new location a similar convenience should exist.

Giving due weight to the mass of material presented at the hearing, much of it contradictory, much of it conjectural, I am of opinion that the representatives of the present town of Hazelton have made out a case for a station location nearer to them than would be afforded by the location on lot 882.

The second paragraph of the operative portion of order 15727 which restrained the railway company as to location of station grounds and station should, therefore, be rescinded, and it should be open to the railway to make application for approval of a station site which will give adequate facilities to the people of Hazelton. The original plan for the location of the station at South Hazelton which is before us, shews that the railway, in the layout of the station grounds and sidings, departed from practically everything which it has considered as a stand-

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ard from the standpoint of engineering and operating practice. Had the Board required the railway to locate a station under the engineering and operating conditions, which it itself chose in this case, there undoubtedly would have been the most strenuous objection upon the part of the railway. When called upon by the railway to approve of such station site as it may deem convenient for the people of Hazelton, the Board cannot, and will not be oblivious of the standard which the railway has chosen for itself.

THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT) and COMMISSIONER MILLS concurred.

Order accordingly.

DRUID LANDOWNERS v. GRAND TRUNK PACIFIC R. CO.
(File No. 19113.)

Board of Railway Commissioners. June 17, 1912.

1. CARRIERS (§ IV D—550)—GOVERNMENTAL CONTROL—DUTY AS TO STATIONS—LOCATION—UNJUST DISCRIMINATION.

In deciding between conflicting applications for the location of a station the Board should only intervene in the case of unjust discrimination between the railway company and the landowners.

2. CARRIERS (§ IV D—550)—GOVERNMENTAL CONTROL—DUTY AS TO STATIONS—LOCATION—FACILITIES—PUBLIC INTEREST.

In deciding upon a location of a station the Board should not deal with the possible growth of a new town, but should ensure that the patrons of the railway should be provided with proper facilities in the public interest.

THE application was heard at Saskatoon, March 20, 1912.

P. E. Mackenzie, for the Applicants.

H. H. Hansard, for the Respondent.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

June 17, 1912. MR. COMMISSIONER MCLEAN:—This application was heard at Saskatoon. Coupled with it is the application of the Grand Trunk Pacific for the approval of its station at Dodsland which is dealt with under File 19440.

The Canadian Pacific branch from Kerrobert to Rosetown approaches the Calgary-Biggar branch of the Grand Trunk Pacific about mileage 44 on the Canadian Pacific branch and runs alongside of it for a distance of about three and a half miles on

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the north side. It then crosses to the south side about one mile from Druid station on the Canadian Pacific. Dodsland station as proposed by the Grand Trunk Pacific will be about one and a half miles west of Druid. Petitioners from Druid desire to have the Dodsland location placed north of Druid so that the Dodsland development may be between the two locations.

It is unfortunate that the growth should be dissipated between the two stations. But except where the Board is justified in intervening because of discriminatory treatment it is not its function to deal with the possible growth of a new town. It is the Board's function to see, in so far as possible, that there are proper facilities for as large as possible a portion of the public using the railways. The evidence presented is contradictory. This is usually the case in applications in which townsites, whether belonging to private individuals or to railways, are involved. At least as many people favour the proposed Dodsland location as oppose it. On the whole, it appears that the proposed location at Dodsland in co-operation with the station at Druid will reasonably serve more of the public using the railway than would the proposed re-location.

As to the transfer track, this is a matter which may be dealt with when the need therefor is shewn. The present disposition as to the transfer track in no way prejudices a later application.

THE ASSISTANT CHIEF COMMISSIONER concurred.

ROLLAND v. GRAND TRUNK R. CO.

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. Montreal, January 24, 1912.

1. APPEAL (§ II C 1—50)—AWARD OF ARBITRATORS UNDER RAILWAY ACT (CAN.).

   No appeal lies in the Province of Quebec to the Court of King's Bench from the judgment of the Superior Court upon an appeal under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, from the award of an arbitrator.

2. EMINENT DOMAIN (§ II D—101)—REVIEW OF AWARD UNDER RAILWAY ACT (CAN.).

   An application to the Superior Court in the Province of Quebec under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, to set aside an award of arbitrators, made in expropriation proceedings under that Act, on the ground of the inadequacy of the compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from

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a decision of an inferior court, and that the court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application.

MOTION to quash appeals on the ground of want of jurisdiction.

An order was made quashing the appeals.

Barnard, McKeown & Barry, for the appellant.
A. E. Beckett, K.C., for the respondent.

The following opinion was handed down.

CROSS, J.:—The respondent moves that these appeals be quashed, on the ground that there is no right of appeal to this Court. The proceedings in the Superior Court, upon which judgment was rendered, consisted of an application to set aside an award of arbitrators, made in expropriation proceedings taken under the Dominion Railway Act, R.S.C. 1906, ch. 37.

The appellant, from whom the land was to be taken, complained of the proceedings of the arbitrators and of the award, alleging, amongst other things, that the amount awarded was grossly inadequate. The respondent also attacked the proceedings of the arbitrators and their award, alleging, amongst other things, that the amount awarded was excessive. In so far as the proceedings in the Superior Court are to be considered as appeals to that Court from the award, it is acknowledged, by both parties, that no right of appeal from the judgment of the Superior Court to this Court exists.

Section 209, Railway Act, provides for an appeal from the award, upon any question of law or of fact, to a Superior Court. It has been held, that, in view of the terms of that section, only one appeal was provided for, and that, after having appealed to the Superior Court, a party could not appeal from the decision of the Superior Court, to this Court. This is now conceded by counsel for the appellant. But the appellant says, in answer to the motions, that sub-section 4 of section 209, provides that the right of appeal, given by that section, does not affect the existing law or practice in any province, as to setting aside awards, and he contends that the proceedings in the Superior Court were not simply appeals to that Court, but

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were, in effect, actions to set aside the awards, as well. The sole question for decision is, therefore, involved in the answer to be given to the question whether the proceedings in the Superior Court were simply appeals to that Court, from the award and nothing more, on the one hand; or whether, on the other hand, they were not merely appeals to the Superior Court, but were, at the same time, in effect, actions to set aside the award. That question is to be decided by what the substance and purport of the proceedings really are, rather than by any particular name which may have been given to them by either party.

Taking, in the first place, the proceedings in the Superior Court, instituted by the present appellant, I find that they were commenced by a petition, addressed by him to the Superior Court, wherein he prayed "That a writ of appeal, in the nature and form of an appeal from a decision of an inferior Court, to this honourable Court, do issue, etc.;" that the arbitrators be summoned to produce the papers and to hear the judgment, and that, upon said appeal, the Superior Court should annul and set aside the award as illegal, irregular, insufficient and inadequate, and that the Court should proceed to adjudge and decide upon the amount of compensation and damages, and should render the award that the said arbitrators should have rendered in the first instance.

Leave having been given to issue out the writ, the appellant thereupon took his writ and attached to it his statement or demand and conclusions. This demand is addressed to the Superior Court sitting in and for the district of Montreal, as a petition. It commences by setting out the giving of a notice of expropriation; the appointment of arbitrators and the making of the award; the paragraphs to this effect concluding with the statement "and your petitioner is desirous of appealing from same, both on questions of law and of fact."

The statement goes on to set forth that the award is illegal and contrary to the evidence adduced, for a number of reasons set forth, namely:—

> (*a*) Because the said award is inadequate and insufficient; (*b*) because the amount so awarded is considerably less than the amount of compensation and damages proved before the arbitrators; (*c*) because the said award is null and void upon the face thereof and is informal; (*d*) because the said award does not comply with the requirements of the Railway Act; (*e*) because the lands and other

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property and the rights and privileges, for which the said award is intended to be compensation, are not stated clearly or sufficiently in said award; (*f*) because the award, as made in notarial form before the said Leclerc, notary, on the 2nd of April, 1909, is not the same as the award actually made at the meeting of the arbitrators, on the 27th of March, 1909.

Specific complaint is made that the notarial deed of award varies from the arbitrator's minute of award, by making the sum awarded cover damages, whereas, by the minute, it purported to be awarded for land only. Then follow the conclusions of the demand, which are as follows:—

Wherefore your petitioner, who hereby appeals from the said award of said arbitrators, prays that a writ of appeal in the nature and form of an appeal from a decision of an inferior Court to this honourable Court, do issue to summon, and that, upon same, the said arbitrators may be summoned to be and appear before this honourable Court, within six days after the service upon them of said appeal, and to produce and file all papers, writings and documents which they may have in connection with the said award, and more especially the notes of evidence taken by them and the exhibits filed therewith, and be further summoned, together with the said respondent, to hear the judgment of this Court in the premises, and that, upon the said appeal, this honourable Court do annul and set aside the said award so rendered on 27th of March last, 1909, as aforesaid, as also the said pretended award (*sentence arbitrale*), rendered before the said notary Leclerc, by the said arbitrators on the 2nd of April last, 1909, as illegal, irregular, insufficient and inadequate, and that this Court do proceed to adjudge and decide upon the amount of compensation and damages to which your petitioner may be entitled by law, and the statutes in such case made and provided, and do render the award that the said arbitrators should have rendered in the first instance, and do therefore, condemn the said respondent to pay your petitioner such amount of compensation for such lands and for said damages, as this Court finds should have been so awarded your petitioner by said arbitrators, the whole with costs *distraits* to the undersigned.

I do not see how a demand, worded as is this one, can be regarded as anything else than an appeal to the Superior Court under the Railway Act. As has been pointed out, that is distinctly the way in which the appellant himself characterized it. He prays, in the opening of his conclusions, for a writ of appeal and proceeds to state what is to be accomplished by the appeal, namely: transmission of the papers; the setting aside of the award, which he expressly asks to be ordered "upon the said appeal," and then he proceeds to make a de-

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mand which is distinctly characteristic of an appeal and not appropriate to an action to annul, namely: the demand that the Superior Court shall proceed to adjudge and decide upon the amount of compensation and should render the award that the arbitrators should have rendered. The entire demand has, thus, fastened upon it, the character of an appeal. Then, in regard to the proceedings initiated by the railway company respondent, in the Superior Court, it may be said that the same mode of commencing by a petition for issue of a writ and of subsequently taking out the writ upon leave given, was adopted. The recitals of the petition for issue of the writ would seem to be a copy of those of the application made by the appellant. Then in regard to the statement of claim and conclusions, the same form of averment is adopted. The expropriation proceedings, the arbitration and the award are set out, and thereupon the respondent alleges:—

> That inasmuch as by a petition served upon your petitioner by respondent, said respondent prays leave to appeal from the said award, both on questions of law and of fact; your petitioners are desirous of filing a cross-appeal from the said award, both on questions of law and of fact.

Thereupon, the grounds taken against the award are set out much after the same manner as they were set out in the demand or statement of claim of the appellant, though the complaint, as regards amount, is made in the opposite direction and upon opposite grounds. The prayer is a counterpart of the prayer made by the petitioner in his appeal to the Superior Court, concluding with the same demand that the Superior Court shall render the award that the arbitrators should have rendered, and, to that end, declare that the amount offered by the notice of expropriation was sufficient.

In both cases, I would, therefore, say that the action cannot be called an action to set aside the award. My conclusions, therefore, would be that the motions should be granted. It may be added that the circumstance that the appellant tendered and pleaded a confession of judgment upon the respondent's petition, does not affect the question raised by these motions.

Appeals quashed.

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MARSON v. GRAND TRUNK PACIFIC RAILWAY CO.

Alberta Supreme Court, Harvey, C.J., Scott, and Stuart, JJ.
February 3, 1912.

1. DAMAGES (§ III K 1—205)—TRESPASS—SPECIAL DAMAGE—MEASURE OF COMPENSATION.

The rental value of land is not to be adopted as the measure of damages for a trespass thereon if special damage is alleged and proved and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and natural and probable use of his land.

[*France* v. *Gaudet*, L.R. 6 Q.B. 199, followed.]

2. EVIDENCE (§ II E 5—165)—KNOWLEDGE OF REASONABLE USES OF LAND—NOTICE PRESUMED—TRESPASS.

A trespasser on lands is to be dealt with as having notice or knowledge that the owner of the land will try to use it in any reasonable and usual way which may be profitable to him, and is accountable for damages accordingly.

[10 Halsbury's Laws of England 317, discussed; *Lloy* v. *Dartmouth*, 30 N.S.R. 208, specially referred to.]

3. DAMAGES (§ III K 1—206)—FORCIBLE POSSESSION OF LAND—ANTICIPATED USE—SPECIAL DAMAGE.

The extension by the owner of land of an existing pig corral is not such a peculiar and unusual use of the land as will relieve a trespasser from the duty of anticipating the probability of it, and being charged in damages for the interference with the owner's intended exercise of his right in that respect.

4. EMINENT DOMAIN (§ III C 1—142)—RIGHT TO COMPENSATION—ABANDONED NOTICE TO EXPROPRIATE—ANTICIPATED PROFIT ON A CROP.

The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

5. DAMAGES (§ III P—334)—LOSS OF PROFIT—EXCLUSION FROM LAND.

Where excavations and other trespasses by a railway company prevented the land owner from extending his pig corral so as to keep the increase of the pigs and the corral thereby became crowded and unhealthy, resulting in the death of some of the pigs and the depreciation of others in value, the owner will be limited to such damage as would have resulted had he reduced the number of his pigs to what he had theretofore safely kept, and he cannot recover as special damage more than the difference in the selling value, at the time of the trespass of the pigs he should have removed and sold for lack of accommodation to keep them and their value at the time when they would have been the most fit to sell less the saving in feed and labour by reason of the reduced number.

O. M. Biggar, for the defendants.

E. B. Edwards, K.C., for the plaintiff.

The judgment of the Court was delivered by

STUART, J.:—This is a story, not about pigs in clover, but about pigs in mud. The plaintiff owned a certain lot in the

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outskirts of Edmonton. He had the southern portion fenced in and in 1907 had used this fenced portion as a pig corral, raising young pigs and feeding them until fit for sale. In the spring of 1908 he was using the same corral for the same purpose, the rest of the lot not yet being fenced in at all but being open prairie. The defendant trespassed upon the unfenced portion, dug a deep cut for the railway through part of it and covered a great deal of it with the excavated earth. The plaintiff says that he intended to extend his corral so as to take in the rest of the lot, but by reason of the defendant's action it was rendered unfit for this purpose, in consequence of which his pigs, which in 1908 were considerably increased in number, were confined in too narrow a space so that the ground became filthy and unhealthy, whereby he lost a number of pigs by death, and the selling value of others was greatly decreased.

A reference was made to the clerk at Edmonton to assess the damages. He estimated the damage suffered by the plaintiff at $640. Upon motion before Mr. Justice Scott to confirm this report and to enter judgment, the matter was sent back to the clerk for further report upon the ground that the plaintiff should have done all he could to minimize the damage, particularly by securing other land for his purpose. The clerk took further evidence and in his report disallowed the claim entirely on the ground that although the plaintiff had endeavoured to secure other land he had not looked in the right direction and had not availed himself of land of his own which he might have used. Upon motion by the plaintiff before Mr. Justice Beck to vary this report, the learned Judge directed judgment to be entered for the plaintiff for $640, the original amount of damage found by the clerk to have been suffered by the plaintiff, and this upon the ground that the burden was upon the defendant company to shew that other suitable land was available for the plaintiff to rent which they had not shewn, and on the ground that the evidence shewed that the other land owned by the plaintiff was not available for the purpose because such a use of it would have created a nuisance to the plaintiff himself and to his neighbours.

The defendants appeal from this judgment upon the ground that the true measure of damages is the fair rental value of the land trespassed upon, and also on the ground that the damage from loss of life and condition among the pigs was too remote, and that in any case the amount allowed was excessive.

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I agree with the Judge appealed from that the plaintiff did all that he could reasonably be expected to do in the way of attempting to secure other premises. If other suitable premises were, in fact, available for him for his purpose I think it was incumbent upon the defendants to shew that these could have been secured without unreasonable expense or trouble. But, for myself, I am unable to conclude that this settles the matter in the plaintiff's favour. It does not seem to have occurred to any one that there were other ways of minimizing the loss. Assuming for the moment that the damages claimed are not too remote and are the natural consequence of the act of trespass it appears to me to that the perfectly obvious course for the plaintiff to adopt was to reduce the number of his pigs to the number which he had kept the previous year in the same place without loss and without feeling the necessity of extending the boundaries of his corral. The plaintiff in his evidence says that he had never kept less than 100 pigs in his corral. It is not very clear whether he meant to say, although he is, in fact, reported to have said that he had kept 200 pigs in this same corral the year before. His evidence is as follows:—

Q. How many did you have in May, 1907, there?

A. Sometimes I had 125; I don't know exactly.

Q. Sometimes you had 200, didn't you?

A. Yes.

Q. Why didn't you say so?

A. Like this year, I have 200.

Q. This year, was May of 1908?

A. Yes, I had 200 this year.

Q. I am asking you for May of 1907? You had that 200 that year too? Why don't you say so?

A. Two years ago, I want to tell you that I don't know really how many pigs I had at that time, but I never kept less than a 100, 125, 150, but I can't tell you how many I had that time.

Q. You might have had 200?

A. No, sir; I never had more than 200 only this year I had 215 or 225, something like that.

And again, he says:—

Q. How many had you the year before?

A. I don't remember exactly how many, but I know I had not so many.

Q. Well, how many?

A. I can't tell you; I never counted them, because like I told you a few minutes ago, you see when I am selling pigs I used to replace them.

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Q. Did you have 200?

A. No, not on that place, no; I only had a hundred on that place at the most.

Q. You swear that?

A. Yes, sir.

Q. That you never had more than 100 pigs in this three-quarters of an acre the year before?

A. Yes, the year before, about a 100 pigs.

Q. I want you to swear positively.

A. I never counted them. I had interest this way for myself, but I never counted them, I used to feed about 100 or 125 pigs all the time.

Q. Do you want to swear this, that in the year before you didn't carry more than half the pigs that you did last year?

A. Yes, about that, a 100; I never keep less than a 100 pigs, 125, sometimes 150, and the first year I kept 500.

Q. Do you know what you said just now, you never kept more than a 100 pigs? You never kept less than a hundred?

A. Yes.

Q. So that was the lowest figure you ever kept there?

A. Yes.

And again, he says:—

Q. Well, now, did you have any more than a hundred at any time in 1907?

A. Well, I guess I had more, yes.

Q. Did you have 150?

A. Well, during the winter, yes, I guess I had pretty near 150.

Q. That is, during the year 1907?

A. Yes.

Now I gather from this that the plaintiff admitted that he kept as many as 150 pigs in his corral during the season of 1907 without feeling any urgent necessity for extension. It is also fairly clear that there was 30 or 33 feet outside of his corral north of it and between it and the cutting which he might have taken into his corral by extending his fence. He says:—

Q. You had 30 feet between your piggery and the cutting that was high land?

A. Yes.

Q. That you could have used?

A. I could have used it, I used it too, but I used to put my tank here, and we need a road to go alongside the pasture, and I used to keep my tank to empty my load, so I wanted a little strip to make a road to go round my pasture.

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In view of this evidence I think it is clear that he could at least have used some portion of the 30 feet (or 33 feet as he calls it elsewhere), and could in any case have kept 150 pigs as safely as he had kept those which he had kept in 1907, as he says, without loss.

The number of pigs he was keeping in 1908 was put by him at between 200 and 225. He nowhere swears positively to more than 215. It is, therefore, clear that he cannot safely assume that his pigs were overcrowded in any greater extent than 65 in number.

The plaintiff swears that he knew he was overcrowded and that he tried to get other premises but could not do so. The obvious thing for him to do in order to obviate damage resulting from inability to use his extended quarters was to sell 65 pigs and keep his number down. It will not be suggested that he could not sell them. There is surely a market for pigs at all times, even if they are not fat. If, therefore, he had sold 65 of the most saleable of his pigs he would have been in just as good a position as he was the year before. It cannot, I think, be contended that he had a right to keep his excessive number of pigs there and see them die and deteriorate before his eyes and then charge the defendants with the whole loss.

It is somewhat difficult to gather from the evidence what the increase in selling value of 65 of the plaintiff's most saleable pigs between the date of the trespass and the ordinary selling time when they would be the most fit for sale would be, but making the best that can be made from the evidence I do not see that the difference could possibly be more than $4 or $5 a piece on an average at the very outside. Parker, a witness called by the plaintiff, swore that young pigs when weaned are worth $5.00 a piece, while when they are grown and fat they bring between $10 and $12 a piece. Grown pigs, of which the plaintiff swears he had, I think, 55, would before fattening be worth more surely than the young weaned ones. They ought to be worth at least $6 a piece. Taking the difference in value, therefore, at $5 a piece the loss without any deduction for saving of food and labour would be only $325. Notwithstanding what the plaintiff said about there being no additional labour involved in attending to 50 more pigs, I think some allowance should be made for labour. He did not, in any case, have to incur the labour and expense of building his extended corral. The food for 65 additional pigs was something which he would have saved

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by selling them at once. On the whole I think $250 is the utmost that could safely be allowed. I am confident that if the plaintiff had adopted the reasonable course of keeping his number of pigs within the number which he had safely kept the year before without loss on the same space by selling 65 of them when he saw his intending extension of premises to be impossible he would not have incurred an actual loss of more than $250, that is a little less than $4 a piece.

Mr. Justice Beck in restoring the original finding of the clerk simply accepted his calculations, and in his first report the clerk gives no indication of how he arrived at the sum of $640. Indeed, Mr. Justice Scott seems to have understood this to have been the cost of repairing the premises injured, which is clearly under the authorities not the true measure of damages and cannot in any case be applied here. Even if he calculated the loss on the pigs, it is clear that he must have taken into account losses from death which the plaintiff could easily have prevented by reducing his number. He must have proceeded upon a wrong principle and, I think, we should now end this unfortunate wrangle by dealing with the case as best we can on the evidence before us without again sending it back for further evidence and further costs. I think $250 only should, in any case, be allowed on the first item.

With regard to the contention that the rental value of the land should be adopted as the measure of damages, it seems to me that it is utterly impossible and unfair to apply such a rule here. It amounts to saying this, that a person who deprives another of the use of his land is only to pay the injured person what the land could be rented to third parties for. The result of that would be that if no tenants could be found at all for the land, if it had no regular rental value because it was no use to other people, yet, though its use might be exceedingly valuable to the owner whose remaining land was adjacent to it and who could, owing to its proximity to his own, have made a profitable use of it in connection with his other land and who in fact was prevented from making such use by reason of the trespass, nevertheless the owner is to get no damages at all. It is, in my opinion, useless to attempt to apply a general rule which has been applied in cases where the facts do not correspond. I have found no case of pure trespass to land where the rule of mere rental value was applied in such circumstances as exist here. I cannot see how it can be open to

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a trespasser to say to the owner, "Oh, I had no idea that you intended to use your land in that way." A trespasser must be held to know that the owner of land will try to use it in any reasonable and usual way which would be profitable to him.

In Halsbury's Laws of England, vol. 10, p. 317, it is said:—

> The rule with regard to special circumstances is somewhat different in cases of tort from that in case of contract. In cases of tort which are not founded upon contract the defendant's knowledge must be estimated at the time of the wrongful act. And the enquiry is not only whether he knew of any special circumstances attaching at the time but also whether he had reasonable means of knowing them and whether the damage which ensued was such as he could fairly be expected to anticipate as likely to result from his act.

Again, at pages 340 and 341 of the same volume the two following passages occur:—

> Where by the trespass of the defendant the plaintiff has been wholly deprived of his land he is to be compensated according to his interest and if he is a freeholder entitled to possession the damages will be the total selling value of the land . . . Where the trespass consists of a wrongful and unauthorised use of the plaintiff's land the measure of damages is not the depreciation in the value of the plaintiff's land or the amount required to repair the injury which has been suffered but such reasonable payment in the nature of rent as would have been required for a license to make use of the plaintiff's land during the period whilst it was so used.

The authorities quoted for the last proposition are, as will appear on examination, carelessly cited but the result I deduce from them and other cases is this, that in the absence of special damage where a plaintiff is deprived of his land entirely, the trespasser must pay merely its value, or, where he is deprived of its use for a term, the value of that term, just as if a lease or license had been given. The same rule, indeed, applies to land as to chattels. If the plaintiff's chattels are taken away the trespasser must pay their value in the ordinary case. But special damages may be pleaded and proven. For example in *Bodley* v. *Reynolds* (1846), 8 Q.B. 779, although the tools converted were worth only £10 the plaintiff was given damages for loss of their use as well and got a judgment for £20. The Court there said, "where special damage is laid and proved there can be no reason for measuring the damages by the value of the chattel converted."

In *France* v. *Gaudet*, L.R. 6 Q.B. 199, at page 205, there is the following reference to *Bodley* v. *Reynolds, supra*:—

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> We think that (in that case) there must have been evidence of knowledge on the part of the defendant that in the nature of things inconvenience beyond the loss of the tools (*i.e.*, I take the Court to mean the value of the tools) must have been occasioned to the plaintiff.

Now it seems to me that these cases dealing with chattels furnish a solution of the problem as to rental value of land being the true measure of damage in case of trespass. The rule is as stated in the extracts from Halsbury's Laws of England [vol. 10, pages 317, 340] that where the whole land is taken its value is the measure of damage just as in the case of total conversion of chattels. Where, however, there has been only a wrongful user for a period the value of the estate taken, i.e., a lease for the term of the trespass, is the ordinary measure of damage. But this is aside from any question of special damage. In none of the cases upon which the rule of rental value is based does there appear to have been any question of special damage raised. The plaintiff was simply deprived of his property, *viz.*, a short term in the land. The question was, what was the value of the term, *i.e.*, the rental value; just as in the case of deprivation of chattels the ordinary question is, what was their value. But it appears clear that in the one case of land as well as in the case of chattels special damage arising from deprivation of use for special purposes may be pleaded and proven. There may be damages given not merely for the value of the goods converted, of the term in the land forcibly taken but also "for the detaining," if the plaintiff has suffered any special damage by reason thereof. The statement of claim is not before us but the appellants are seeking to modify the judgment. They were chiefly responsible for the contents of the appeal book, the enquiry before the clerk proceeded upon the basis of special damages having been claimed, and I do not think it would be open to the appellants now to say that special damage was not alleged in the pleadings.

The view I take seems to have been followed by Meagher, J., in the appeal in *Lloy* v. *Town of Dartmouth*, 30 N.S.R., at page 213.

There are also some notes of American cases in Cyc., vol. 13, at pages 152 and 155. A Texas appeal case says:—

> While the measure of damages for placing cars in front of plaintiff's premises is in general the depreciation in value of the use of

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> the property during the time the cars are there, special damages may also be recovered where they are warranted by the facts and are pleaded with particularity and certainty.

And a Pennsylvania case says:—

> The true rule of damages in such a case is to estimate the injury sustained from the diversion of the water in the use of the land for the purposes to which it was devoted *or for which it would have been used but for the refusal of the defendant upon notice to discontinue the diversion.* As a means of computation a reduction of rental value from this cause may be shewn.

The only question, therefore, is the question of notice or knowledge as referred to in the first quotation I have made from Halsbury [Laws of England, vol. 10, page 317] and in *France* v. *Daudet*, L.R. 6 Q.B. 199.

Now in none of the cases which are given as authority for the rule, just above quoted from Halsbury [Halsbury's Laws of England, vol. 10, p. 317], was there a trespass to land. In general the rule has been deduced in cases of accident from negligence and the like, or from breach of some statutory duty. In the case of trespass to both chattels and land it seems to me the rule that the damage must be such as the defendant could fairly be expected to anticipate as likely to result from his act may well be applicable; but in my opinion a trespasser can always be fairly expected to anticipate that the owner will be intending to use his property, whether chattels or land, in any reasonable and usual way.

Possibly anticipation of some very peculiar and unusual use intended to be made of the property could not be fairly expected of him, but it seems to me that extension of a pig corral already on part of an owner's property to wider boundaries so as to give greater accommodation is not such a peculiar or unusual use as to relieve a trespasser from the duty of anticipating the possibility of it.

The evidence points strongly to the conclusion, and the clerk I think, must have so found that the plaintiff was overcrowded and that he intended to relieve this by an extension of his corrals. I think we must take it to be the fact that he was prevented from an actually intended natural, and probable, use of his property by the defendants' trespass and that, assuming him to have done what I think he should have done, *viz.*, sell 65 of his pigs, he was prevented from carrying this additional number and so from realizing a profit thereby. It is, of course, purely

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a case of loss of profits. The plaintiff had his pigs there. He had all arrangements made for keeping them except the extension of his corrals. The simple question is this: If he had sold 65 pigs for what they would bring could he have sued for damages for loss of profit of these, saying that he was deprived of a place to keep them properly so as to fatten and sell them at a better time? The rule as to recovery of profits as damages is stated to be "that they can be recovered only when they are made reasonably certain by the proof of actual facts with present data for a rational estimate of their amount": see 13 Cyc., p. 49.

In the present case, I think, the fact of loss of profit is sufficiently certain, although the exact amount may be difficult to ascertain from the evidence as it stands. Loss of profits arising from the prevention of a clearly intended and obviously reasonable and natural use of land as a place of business, or as a means of extending a business already existing, seems to me to be a natural and proximate result of such prevention.

I think, therefore, though with some hesitation, that there should be damages in this respect, but I am satisfied that they should be reduced to $250.

The defendants also appeal from the finding of Mr. Justice Beck whereby he allowed the sum of $250 as damages resulting from the service of an abandoned notice to expropriate lot 32. The clerk in his second report, acting upon the opinion expressed by Mr. Justice Scott, allowed only $50 as being a fair rental value. The plaintiff claimed that he had intended to use this land as a garden and that he had prepared most of the land for this purpose the year before by breaking and clearing it. He had not cropped it at all before himself, but his brother had cropped about half an acre of it and had raised some vegetables, cabbages, carrots, beets, onions and lettuce. There is no definite evidence to shew how much the plaintiff could make out of a garden such as this, no evidence of what he or his brother ever had made out of a garden. The whole question simply is reduced to this: Can the plaintiff recover as special damage the anticipated profit on a crop of vegetables which he was prevented from sowing or planting. In my opinion, there is much more uncertainty here than in the case of the pigs. Weather conditions and conditions of soil do not affect them. Crops are notoriously dependent upon the uncertainties of weather. I am satisfied that we have here too much certainty to justify a Court in awarding damages for loss of anticipated profits. My brother

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Beck, suggested that in any case twenty per cent. of the value would be a fair rental value for such a piece of ground, but with great respect I cannot see that we are justified in fixing that as the rental value arbitrarily when there is no evidence at all to suggest it. The clerk himself went far enough in that direction when he disregarded the only evidence adduced which was to the effect that $10 an acre would be a fair rental and allowed five per cent. of the value, *viz.*, $50. I think that allowance should in any case not be increased, and that the Clerk's decision should on this point be left undisturbed. The nominal allowance of $5 for loss of business should, I think, in view of what I have said be also disallowed.

The result is that judgment should be directed to be entered for the plaintiff for $300 as damages for the trespass complained of, with interest at six per cent. from July, 1908, or $345 in all.

With regard to costs the defendants should get the costs of the first motion for judgment before Mr. Justice Scott because that motion was refused, and properly so. The plaintiff should get the costs of the motion to vary before Mr. Justice Beck because he was right in being dissatisfied with the clerk's second decision. The defendants should get the costs of this appeal because they have been substantially successful. The costs of the second reference should be treated as part of the costs of the first which are disposed of in the original judgment at trial. These various costs of the actions should be taxed and a balance struck including the amount for which judgment is now directed to be entered and a final judgment entered in favour of the party to whom the excess is due for the amount of such excess.

Judgment for plaintiff for $300, *with set-off of costs.*

THE KING on the Information of the Attorney-General of Canada (plaintiff) v. MONCTON LAND COMPANY, LTD., NAPOLEON J. GOVANG and PACIFIC D. BREAU (defendants).

Exchequer Court of Canada. Cassels, J. February 14, 1912.

DAMAGES (§ III L 2—240)—EMINENT DOMAIN—VALUE OF EXPROPRIATED LANDS.

The value of lands expropriated for a public work is to be determined prima facie upon the basis of the market price, but the prospective capabilities of the property have to be taken into account in ascertaining the market price, and an additional allowance made for compulsory expropriation.

[*Brown* v. *The King*, 12 Ex. C.R. 463, and *Dodge* v. *The King*, 36 Can. S.C.R. 149, specially referred to.]

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AN information filed on behalf of the Crown to have the value of certain lands expropriated for the use of the Intercolonial Railway ascertained.

Messrs. *H. A. Powell,* K.C., and *J. Friel,* for the Crown.

Messrs. *W. Nesbitt,* K.C., *M. G. Teed,* K.C., *C. W. Robinson,* and *Geo. L. Harris,* for the respective defendants.

CASSELS, J.:—The lands expropriated comprise 11⅛ acres situate in the city of Moncton. The trial lasted four days, and a great deal of evidence was adduced. Since the trial I have carefully analyzed the evidence. I do not propose to quote therefrom, as to do so would necessitate repeating a considerable part of it.

It is agreed that the date at which the expropriation took place and for ascertaining the compensation is the 23rd October, 1909. There is not room for much dispute as to the method of arriving at the compensation.

The company, whose lands are expropriated, are entitled to be fully compensated for the loss they have sustained by reason of the exercise of the right of eminent domain. I have had occasion to express my views in *Brown* v. *The King,* 12 Ex. C.R. 463, and other cases. *Dodge* v. *The King,* 38 Can. S.C.R. 149, is a guide. "Prospective capabilities" have to be taken into account. *Primâ facie* the market price governs. Usually the prospective capabilities form an element in fixing the market price. In the present case the lands are situate in the city of Moncton. They were, before the expropriation, divided by plan into building lots, and I propose in dealing with the question of compensation to deal with them as such, although I do not think it of much consequence whether they were so laid out on a plan or not. The real point is what method of realizing would yield the best return. I know of a recent sale of land within three miles of a large city used as a farm which realized $3,500 an acre. The purchaser acquired the lands to be retailed on the market for building lots. There is no magic in a plan. In the case before me the lands in question were treated as building lots by the Government valuators. The area taken by the railway comprised 11⅛ acres. It was assumed at the time that this was equivalent to sixty-one and one half lots.

It is hardly questioned that after the expropriation the best method of laying out the remaining lands north and south of the expropriated area is by laying out the two streets Essex

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and York running west to east as shewn on the plan. This method of utilizing the lands minimises as far as possible the damage caused by the severance of the lands, and is, I think, in ease of the Crown.

There are said to be, as I have stated, sixty-one and a half lots expropriated. To the north there remain 289 lots; to the south 180 lots. Allowing for the cross streets Essex and York streets would each require 2.3 acres, or 4.6 acres for both.

Mr. Jones states, and it does not seem to be disputed, that allowing for streets of the width in question, each acre divides into 6-7/10 lots.

These 4.6 acres would yield 30.82 lots which have to be put into roadways. It was suggested at the trial by counsel that as Imperial avenue, which the company intended to lay out, would have been lost for building lots, therefore only one of the new streets should be allowed for, the other being in lieu of Imperial avenue, and this seems to have been the view of all concerned. It no doubt would be correct on that understanding. On analyzing the evidence I find, however, that Mr. Taylor, in arriving at the 61½ lots expropriated (called the 11½ acres) has deducted the area comprised in the proposed Imperial avenue, otherwise instead of there being 61½ lots there would be about 77 lots. I therefore propose to allow for the lots lost by the laying out of both York and Essex streets, one of the streets as mentioned having been deducted in reducing the 11½ acres to 61½ lots. The result is that the lands expropriated and the lands necessitated for streets amount to 61½ plus 30.82 lots, or about 92 lots.

The lands north of the expropriated land comprise 289 lots, from which must be deducted 15.41 lots taken for Essex street, leaving 274.41 lots. The lands south of the expropriated land comprise 180 lots, and deducting 15.41 lots for York street, leaves 165.41 lots.

It is difficult to arrive at an exact sum as the fair value of the damage. There is no doubt the damage to the property both north and south of the lands expropriated caused by the severance and the closing of the streets is considerable. The damage as to those lots south of the expropriated land is not so great as to those on the north, nor is the damage to the lots either north or south equal to the damage to those nearer to the railway which necessarily suffer more than those more remote. The land company claims $100,000; the Crown offers $15,889.

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The fact of the discovery of natural gas at the works of the Transcontinental Railway, necessarily has to be considered. Moreover, it is apparent that some lots are more valuable than others.

I think I will be doing justice to all parties if I fix the value of the lots at $175 on the average.

Taking 92 lots expropriated at $175 would equal.....$16,100
The injury to the lots north of the expropriated land, 274, averaging them, I would place at $20 a lot.... 5,480
The injury to those south (180 lots) averaging them, I would place at $15 a lot 2,700

$24,280

If to this amount the sum of $3,000 be added for compulsory expropriation and cost of grading one of the two cross streets and incidentals the total would amount to $27,280, and this amount I allow to the company. Interest should be allowed on the $16,100, an dthe company are entitled to their costs of action.

I had written my opinion several weeks ago, but have delayed delivering it until the undertaking offered by the Crown was settled upon and filed. This undertaking was filed to-day and should be embodied in the formal judgment. I think if the defendant Breau be allowed $150 for the land taken from him and the damages, he will be fully compensated, and I allow him his costs which I fix at $50.

Judgment accordingly.

HANEY v. WINNIPEG AND NORTHERN RAILWAY CO.

Manitoba King's Bench. Motion before Prendergast, J. March 8, 1912.

1. EVIDENCE (§ II K—330)—STATUS OF PARTY ATTACKING PROCEEDINGS IN EMINENT DOMAIN—SERVICE OF NOTICE—TITLE.

On an application to the court to restrain expropriation proceedings taken by a railway company on the ground that the company had agreed upon a price with plaintiff, the plaintiff's status is proved *prima facie* by shewing that he had been served as owner with notice of arbitration proceedings by the company without his further shewing his title or interest in the land.

2. CONTRACTS (§ I E 6—121)—REQUISITES—SALE OF LAND—EFFECT OF TAKING POSSESSION.

A contract to purchase is not established as against a railway company entitled to take lands by eminent domain proceedings, by the fact of the company having taken possession of same after notice from the owner naming his price and stating that if they took possession he would construe their action as an acceptance of his terms.

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APPLICATION for an injunction restraining defendant company from proceeding with an arbitration upon expropriation proceedings by a railway company.

The motion was dismissed.

J. B. Coyne, for plaintiff.

O. H. Clark, K.C., for defendants.

PRENDERGAST, J.:—Plaintiff need not shew his interest in the land; his having been served by defendants with notice af arbitratitn proceedings gives him his status on this application.

The application is based on an alleged contract whereby the defendants are said to have agreed to pay plaintiff a stated price for the land, followed by their taking possession of same.

I should probably hold that a *primâ facie* case is made that defendants have taken possession. But as to the defendants agreeing to pay any particular price, there is really nothing shewn except an intimation by the plaintiff that he would not sell for less than so much, and that he would consider the defendants taking possession as an agreement on their part to pay that price. This taking possession surely does not constitute an agreement to pay the price asked, even if plaintiff intimated that he would put that construction on defendants' action. There is not the least evidence of an agreement as to price.

The application is dismissed with costs.

Injunction refused.

CARR et al. v. CANADIAN PACIFIC R. CO.

Supreme Court of New Brunswick, Barker, C.J., Landry, and McLeod, JJ. April 19, 1912.

1. EMINENT DOMAIN (§ I E—78*a*)—RIGHT ACQUIRED BY RAILWAY COMPANY —ABANDONMENT BY RAILWAY—EASEMENT.

The title to land expropriated for a right of way by a railway company that received a subsidy under 27 Vict. (N.B.), ch. 3, 1864, and 28 Vict. (N.B.), ch. 12, 1865, is, by the provisions of such Acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

2. TRESPASS (§ I A—5)—WHAT CONSTITUTES—RAILWAY COMPANY LAYING SIDE-TRACK—TAKING POSSESSION OF STRIP NOT OF STATUTORY WIDTH.

A railway company cannot, in an action for a trespass in laying side-tracks on the plaintiff's land, justify on the ground that its predecessor in title, without right, took a strip of land twelve feet wide

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from that owned by the plaintiff, for part of its right-of-way, which was not, at such place, of the width allowed by statute, and that therefore it became entitled to claim the full ninety-nine feet allowed by statute for a right-of-way, which would include the land on which the side-tracks were laid, since the Court cannot presume that the company, by taking possession of the twelve foot strip, also took possession of the entire ninety-nine feet which it was entitled to expropriate for a right-of-way.

3. LIMITATION OF ACTIONS (§ II G—66)—TRESPASS TO LAND—RAILWAY LAYING SIDE-TRACK—R.S.C. 1906, CH. 37, SEC. 309.

An action against a railway company for a trespass committed by laying side-tracks on the plaintiff's land, is not an action for injuries sustained by reason of the construction or operation of a railway, which must, under sec. 306 of ch. 37, of the Railway Act, R.S.C. 1906, be brought within one year after the cause of action arose.

4. LIMITATION OF ACTIONS (§ II G—66)—CONTINUOUS DAMAGE BY RAILWAY —APPLICATION OF R.S.C. 1906, CH. 37, SEC. 306.

Where an injury or damage caused by the construction or operation of a railway is continuous, the limitation of one year for bringing an action therefor, as prescribed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, does not apply.

MOTION by defendants by way of appeal against the verdict rendered for plaintiff on the trial before White, J., with a jury at the Carleton Circuit, October, 1911. The verdict was for plaintiffs for $1,200. The questions to the jury and the answers thereto are as follows:—

QUESTIONS FOR JURY, BY THE COURT.

1. Between the 19th day of May, 1905, and the 26th day of June, 1906, did the defendant trespass upon the plaintiffs' lands, specified in the statement of claim?

Answer. Yes.

2. If you say "Yes" to the foregoing question then at what sum do you find and assess the damages to which the plaintiffs were entitled, for such trespass or trespasses?

Answer. $200.00.

3. Did the defendant continuously, from the 26th day of June, 1906, down to the commencement of this suit, wrongfully and without right as against the plaintiffs, maintain upon the plaintiffs' land, side tracks, leading from the defendants' main line to their yard?

Answer. Yes.

4. If you say "Yes" to the last question (3) then what damages do you find and assess to the plaintiffs for such trespass.

Answer. $1,000.00.

5. Did the defendant, between the 19th day of May, 1910, and the commencement of this suit (which was on the 19th day of May, 1911) trespass upon the lands of the plaintiffs specified in the statement of claim?

Answer. Yes.

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6. If you say "Yes" to the last preceding question (No. 5) then at what sum do you find and assess the damages to which the plaintiffs are entitled for such trespass or trespasses?

Answer. $400.00.

7. Was George Bull, the grandfather of the plaintiffs, at any time during his lifetime, in possession of the land on which are now located the railway side tracks, the maintenance and user of which the plaintiffs complain of as a trespass?

Answer. Yes.

QUESTIONS BY DEFENDANT'S COUNSEL.

1. When were the sidings in question in this case built?

Answer. 1892, and since.

2. When and how did the plaintiffs, if ever, acquire title to the Bull homestead property?

Answer. By the conditions of the will of George Bull and the deed of the trustee.

3. What is a fair rental for the Bull homestead property as it now is?

Answer. Three hundred dollars per year.

4. What would be a fair rental for the said property if the sidings were removed?

Answer. Four hundred dollars per year.

5. When was the main line of railway now operated by the defendant built through the said Bull property?

Answer. 1871.

6. What was the width of the right-of-way originally acquired by the builders of said railway?

Answer. Fourteen feet.

7. Did not the predecessors in title of the plaintiffs sell to the defendant a tract of land next adjoining to the south and forming part of the Bull homestead property to be used as a railway yard and knowing it was to be so used?

Answer. Yes.

8. Did not the vendors at the time of said sale contemplate that the northern entrance to said yard should be from the defendant's right-of-way in front of the Bull homestead property?

Answer. No.

9. Did not defendant purchase the same relying upon having such entrance?

Answer. No.

10. Is not the present entrance to said yard the only reasonable entrance thereto?

Answer. We do not know.

11. Has not the defendant and its predecessors in title for more than twenty years last past before the nineteenth day of May, A.D.

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1911, been in possession of the property now occupied by its tracks in front of the Bull homestead and had to the knowledge of all open and conclusive possession thereof adverse to all subject to the right to the occupiers of the Bull homestead to cross the same?

Answer. In regard to the main line, "Yes" but sidings, "No."

12. Did not the late George Bull in his lifetime grant to the Woodstock Railway Co., the defendant's predecessors in title a right-of-way of the statutory width of 99 feet or some other and what width across the said homestead property?

Answer. No.

13. Was not a railway pursuant thereto built by them across the same?

Answer. We do not know.

14. What width of land through the Bull homestead property did the railway company take at the time of construction of the railway?

Answer. Fourteen feet.

15. Has the railway company continued to occupy the same land since such construction or when if at all did it occupy less or more, and how much less or more, at the Bull property?

Answer. No more than the main line until 1892, and since then sufficient for two sidings.

16. Did the Woodstock Railway Company take a right-of-way through the said Bull homestead property at the time of the construction of the said railway?

Answer. There was a right-of-way taken through the Bull homestead property but we do not know by what company.

17. When was said railway built through said property by said company?

Answer. Railway was built through said property in 1871 but we do not know by what company.

February 15 and 16, 1912. *F. R. Taylor,* for the defendant moved to set aside the verdict for the plaintiff and to enter a verdict for the defendant or for a new trial. The railway has been in actual operation since 1871. The sidings were built in 1892. The Woodstock Railway Company took over this land under the Act 27 Vict. ch. 57. The New Brunswick Railway Company incorporated by 33 Vict. ch. 49, afterwards acquired this land, see Acts 36 Vict. ch. 37 and 40 Vict. ch. 15. The Act 54 Vict. ch. 14 confirms lease from the New Brunswick Railway Company to the Canadian Pacific Railway for 999 years. The expropriation clause in the Act 27 Vict. ch. 57 says that the owner is to be paid if he demands payment. A large part of the land taken by the railway was given to them, and there is no evidence of any demand for payment of this piece. We claim

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that, under the Act, the Woodstock Railway Company took an absolute title to a strip of land 99 feet in width. The statute vests the title in the railway and gives a right of action to the property holders. The only evidence as to the width of the right-of-way at this point is that it was 99 feet in width. We are only occupying 33 feet. The learned Judge charged that the railway had only an easement. I contend this was misdirection.

The verdict is excessive. The plaintiffs are not occupying the land and the only possible damage to them is decrease in rental value. They were getting about $300 a year before we put in our sidings. Plaintiff's one witness said that an outside rent in Woodstock would be $250 a year for a house like the plaintiff's. The jury found that the rental value was $400, and over a period of six years the damage would be $600. Instead of this, the jury have awarded $1,200. The jury brought in a verdict on one question and although there was no dispute or misunderstanding, they were allowed to go out and change their verdict. I cite the Railway Act, R.S.C. 1906, ch. 37, sec. 306; *Kelly* v. *Ottawa Street R. Co.*, 3 A.R. (Ont.) 616; *McArthur* v. *Northern Pacific R. Co.*, 15 O.R. 733, 17 O.A.R. 86; *Levesque* v. *N. B. R. Co.*, 29 N.B.R. 588; MacMurchy and Denison, Law of Railways in Canada, 2nd ed. pp. 513, 514.

[BARKER, C.J.:—If this a continuing trespass the plaintiffs could get an injunction to stop the railway.]

Taylor:—There are no damages for the first year of the trespass because the plaintiffs had only an equitable interest in this property. They did not get their deed until 1906. Section 306 of the Railway Act provides that no suit or action shall be brought for injury or damage caused by reason of construction or operation of a railway, unless brought within one year after the cause of action accrued. Section 42 of 27 Vict. ch. 57 makes a limitation of six months. These sidings were built in 1892.

Currey, K.C. (*J. M. McIntyre*, with him), for the plaintiff, *contra*:—What we say is that as to the main line we make no claim for trespass because the railway had acquired title by possession, but we say they had no title to the land occupied by the sidings. We admit they had a right to take six rods under the Act 27 Vict. ch. 57, but in order to do this, they were bound to pay compensation, which they have not done. There is no presumption as to the possession of the six rods.

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[LANDRY, J.:—When they take possession for the purpose of the railway, did they not in law take possession of all that the law allowed them to take?]

Currey, K.C.:—Not unless they followed the provisions of the Act. As to the limit of time for bringing the action, in the Act incorporating the Woodstock Railway Company, the section applies only to something done under the Act, and does not apply to an act of trespass.

[MCLEOD, J.:—The Act 27 Vict. ch. 57 appears to authorize the company to take and hold the six rods but it is always subject to the condition that they pay for it.]

Currey, K.C.:—That is what we contend and we say that payment is a condition precedent.

In order to get to the plaintiff's residence we had to cross the two side tracks and we were often delayed a long time in getting to the highway. As to our right to recover for more than one year's damages, defendant's counsel did not cite sec. 306, sub-sec. 4, which expressly excludes the limitation.

[BARKER, C.J.:—I understand your contention is that the Woodstock Railway Company would have the right, under the Act, to take and hold the land to the extent of the six rods, but before title vested in them they must take the steps pointed out by the Act to ascertain the value and pay for it.]

Currey, K.C.:—That is our contention. We were in possession. We proved a documentary title. The company pleaded title in themselves, but they failed to prove any title under the statutes or by deed.

F. R. Taylor, in reply.

The judgment of the Court was delivered by

BARKER, C.J.:—This is an action of trespass tried before White, J., with a jury, in which the Judge, on answer to questions submitted to the jury, entered a verdict for $1,200.

It seems that the defendants in 1892 entered upon a piece of land adjoining their track and laid two sidings which have been used ever since in connection with the operation of their road in or about Woodstock. The plaintiffs claim that they were not only the owners of the land in question but that they were in actual possession of it when the entry was made and continued

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so ever since. They claim that the use and occupation of these sidings cause great inconvenience to the occupants of the residence on the property of which the land in question is a part and materially decreases its value. The land in question is a part of property in Woodstock spoken of by the witnesses as the "Bull homestead." It seems to have been in the possession of these plaintiffs, who are the children of Augustus Bull, and of him and his father, for a great many years. Mrs. Ketchum speaks of her father, George Bull, being in possession of it and occupying the house seventy years ago. In 1871, the railway at this point was built, and the company which constructed it seems to have laid their main track on a strip of this Bull property, some fourteen feet wide, which has ever since been used and occupied by the railway which for the time being was operating the line.

So far as there is any evidence on the point, it is not known how or under what circumstances this strip of land was taken. There is no record of it of any kind; there are no fences or anything else, beyond the usual ditches on the side of the track, to define the limits of the taking or of the occupation, and there is nothing to suggest that any proceedings were ever taken to assess the damages for expropriating the land, or that anything was ever paid for it. The plaintiffs, I understand, make no claim to this strip—fourteen feet in width—upon which the main track is laid, the railway having acquired a prescriptive title by possession. There seemed to be some uncertainty at the trial as to the company which actually built this track and took the land for the purpose. It appears to have been claimed by the defendants' counsel that it was built by the Woodstock Railway Company. Mrs. Ketchum's evidence supports that view, and for the purposes of this case I shall assume that to be correct.

The defendants claim as a justification for their entry and laying down the two sidings and their subsequent use of the property in question for the purpose of the railway, that by virtue of certain agreements and assignments, ratified in some, if not all cases by statute, they are the owners or lessees of what was the Woodstock Railway and the company's title to the land acquired by it for the purpose of the railway. It seems that this railway company went through a series of mergers with other companies previous to the defendants' getting it as a part of their system, which it was conceded had been brought about previous to their entry on the land in 1892. To render this

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defence of any value, the defendants must shew in some way that the Woodstock Railway Company had some title or interest or right to the land in question by which the defendants could succeed. To do this we are asked as a matter of law to presume that when the Woodstock Railway Company in 1871 took possession of the fourteen foot strip and placed their main track upon it, they took possession of the whole 99 feet in width to which they were restricted in exercising their right of expropriation. The sidings were within the 99 feet. It was also contended that the land taken in 1871 was taken and held under and by virtue of the authority given the Woodstock Railway Company by its charter—the legal effect of which was to vest in that company the fee and right of possession in the property and not merely an easement as the learned Judge instructed the jury. Add to this the presumption we are asked to make and the absolute title in the whole 99 feet had vested in the defendants previous to their entry in 1892. This is in fact the whole defence set up here by way of a justification for the trespass complained of. I quite agree with the learned Judge in declining to make any such presumption.

The Woodstock Railway Company was incorporated in 1864 (27 Vict. ch. 57), for a construction of a railroad from Woodstock to connect with the Saint Andrew's and Quebec Railway Company. It was given the usual powers of taking and holding land not only for preliminary surveys and location but also for permanent way; the land to be taken was not to be more than six rods in width. Provision was made for the assessment of the damages in the event of the parties not agreeing, and a procedure provided for their recovery. Whether as a result of the provisions of that Act the company would on expropriation take the fee in the land or merely an easement or right-of-way is a question upon which I express no opinion; nor is any necessary in this case. If the defendants' position were correct, it would not alter their title to the property now in dispute for it was never taken or held. In addition to this there was an Act, passed also in 1864, providing for subsidies to various railways, among others to the Woodstock Railway (27 Vict. ch. 3). In 1865, that Act was added to (28 Vict. ch. 12). By this additional Act it was provided that companies entering into an agreement for the construction of any of the subsidized lines mentioned in the Act of 1864 should have specified rights of expropriation, practically the same as in the Woodstock Railway Com-

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pany Act, with a proviso (in sec. 2) that, "the land so taken by the said company" (that is, the company entering into the agreement for the subsidy), "or body corporate shall be held as lands taken and appropriated for highways," that is an easement or right of way, so that in the case of abandonment the title would revert to the original owner. It is said, and I think with every likelihood of the remark being accurate, that the Woodstock Railway Company had this subsidy, in which case the learned Judge's statement was correct. In my opinion the defence entirely fails as against the plaintiffs' title and possession, I desire to add that the defendants do not set up or pretend to put forward that in what they did, and which are the trespasses complained of, they were themselves initiating any expropriation proceedings. They did not profess to be exercising any power for any such purpose which they had either by the acquisition of this railway or which they themselves had under their own private statutes or any public general Act. They relied solely upon a title or right to an easement or whatever it may be called acquired by the Woodstock Railway Company and vested in them as their successors or assignees.

I think the verdict was rightly entered for the $1,200. The limitation of one year provided by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, does not, I think, govern this action. A trespass such as this cannot be considered as an injury or damage sustained by reason of the construction or operation of the defendants' railway; but if it could, then the damage has been continuous, as the jury found. The plaintiffs are, therefore, entitled to the $1,200, the damages assessed for the six years immediately preceding the bringing of this action.

I have not noticed some objections taken to the admissibility of some of the conveyances, for it is clear that if the objections can be sustained the defendants' entry was unlawful as against the plaintiffs' possession.

Appeal dismissed with costs.

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SMITH v. GRAND TRUNK R. CO.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. February 10, 1912.

1. MASTER AND SERVANT (§ III A 4—89)—RAILWAY SWING BRIDGE—NEGLIGENCE.

Where a locomotive driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead and he ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to the negligence of the conductor and not to his own, his act of negligence in passing the semaphore having expended itself when the train stopped at the water tank.

2. MASTER AND SERVANT (§ III A 4—89)—SWING BRIDGE ON RAILWAY—SEMAPHORE AND BRIDGE LIGHTS.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, does not apply where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned and where the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights of the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so.

[*Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 279, reversed.]

APPEAL by the plaintiff from the judgment of Britton, J., *Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 279, dismissing an action to recover for the death of the plaintiff's deceased husband, a locomotive engineer in the employ of the defendants.

The appeal was allowed.

The defendant's Rule 22, referred to in the following judgment, puts the train entirely under the control of the conductor, and his orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable.

At the trial the following questions were submitted to and answered as follows by the jury:—

(1) Was the conductor, McNamara, who was in charge of the train, on the engine of which the deceased C. F. Smith was engineer, guilty

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of any negligence by reason of which C. F. Smith lost his life? A. Yes.

(2) If so, what was that negligence? Answer fully. A. Having passed the semaphore, if the conductor had full authority in the running of the train, he, Mr. McNamara, should have signalled the engineer to back up the train again, until the semaphore was lowered.

(3) Was the deceased, the engineer, guilty of contributory negligence, that is, could the engineer, by the exercise of reasonable care, have avoided the accident? A. Yes.

(4) If so, in what respect was the engineer so guilty? A. For passing the semaphore without permission.

(5) Apart from what may be said of negligence on the part of the conductor or engineer, was there any other negligence on the part of the defendants which occasioned the death of the engineer? A. No.

The jury assessed the damages at $1,800.

J. R. Logan, for the plaintiff.

W. E. Foster, for the defendants.

The judgment of the Court was delivered by BOYD, C.:— Upon the answers given by the jury, I would direct a verdict to be entered for the plaintiff for the damages assessed at $1,800.

The first answer declares that the engineer (represented by the plaintiff) lost his life by the negligence of the conductor of the train; and the details are given in the second answer, that the conductor should have signalled the engineer to back up the train again (*i.e.*, from the water-tank, to which point the engineer had taken the train) until the semaphore (which the engineer had passed) was lowered.

They next find that the engineer was guilty of contributory negligence because of his passing the semaphore without permission. But this last finding was clearly wrongly styled contributory negligence. It was a primary act of negligence which had expended itself when the fore part of the train reached and stopped at the water-tank. There came an interval of several minutes when the train was at a stand-still. Next and finally the train was set in motion by the engineer, in response to the conductor's signal to go ahead, when he saw that the semaphore was against him. The engineer had signalled the conductor that he was all ready (*i.e.*, that sufficient water had been taken), and thereupon came the conductor's signal to go ahead, which he obeyed to his own destruction. But the jury have exculpated him from blame in so going forward, and have put all the responsibility for that act on the conductor.

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I think the learned Judge erred in applying the company's rule 22 as absolutely fixing equal responsibility on the two officers, conductor and engineer. This involves finding that the engineer should have seen the danger and refused to obey the signal to go: but, this aspect of the case was laid before the jury, and they have found that the engineer acted reasonably and with proper precaution when he saw the green lights of the bridge (which indicated all was right to go across), and then went ahead after the signal from the rear given by the conductor. The duty of the engineer is to obey the orders of the conductor; and this the jury find that the engineer rightly did at the critical moment, and thus in effect find that he did not violate the terms of the rule of the company. It cannot be said that this finding is contrary to the evidence; and, therefore, I do not think the strict letter of the rule can be invoked to neutralise the decision of the jury on the facts. The duty of the engineer is to obey the orders of the conductor; and this, the jury find, he rightly did.

The appeal should be allowed and judgment entered for $1,800 with costs of action and of appeal.

Appeal allowed.

CLARK v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. MASTER AND SERVANT (§ II A 4—94*a*)—LIABILITY OF RAILWAY COMPANY TO BRAKEMAN—STAND PIPE NEAR TRACK—COMPLIANCE WITH ORDER OF BOARD OF RAILWAY COMMISSIONERS.

A railway company which has complied with an order of the Board of Railway Commissioners, under sub-sec. (*g*) of sec. 30, ch. 37, R.S.C. 1906, requiring its water stand pipes to be placed 7 feet 6 inches from the centre of its tracks, is relieved from liability to a brakeman for injuries sustained while riding on a ladder on the side of a car, by coming into contact with a stand pipe located as required by such order.

[*G. T. R.* v. *McKay* (1903), 34 Can. S.C.R. 81, followed.]

2. CARRIERS (§ IV A—519)—ORDERS OF BOARD OF RAILWAY COMMISSIONERS—ERECTIONS NEAR TRACK—NOT RETROACTIVE—SPECIAL ORDER.

A general order of the Board of Railway Commissioners, under sub-sec. (*g*), sec. 30, ch. 37, R.S.C. 1906, providing that thereafter no structure more than 4 feet in height shall be placed within 6 feet from the nearest rail of a railway track, and that no water stand pipe shall be placed so that there shall be less than 2 feet 6 inches between it and the widest engine cab, is not retroactive, and does not contemplate the removal of stand pipes within such prohibited distance erected under a special order of such Board permitting the C. P. R. to maintain its stand pipes at a lesser distance.

[*Kutner* v. *Phillips*, [1891] 2 Q.B. 267, specially referred to.]

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3. CARRIERS (§ IV A—519)—CONSTRUCTION OF SPECIAL AND GENERAL ORDERS OF BOARD OF RAILWAY COMMISSIONERS—ERECTIONS NEAR TRACK.

A special order of the Board of Railway Commissioners, under subsec. (*g*) of sec. 30, ch. 37, R.S.C. 1906, providing that water stand pipes shall be placed not less than 7 feet 6 inches from the centre of the tracks of the C. P. R., is not abrogated by a subsequent general order, not retroactive in effect, which prohibited the placing of water stand pipes so that there should be less than 2 feet 6 inches between them and the widest engine cab, so as to render the railway company liable to a brakeman who was injured by coming in contact, while riding on a ladder on the side of a car, with a stand pipe which was 7 feet 6 inches from the centre of the track, but not 2 feet 6 inches from the side of the widest engine cab.

4. MASTER AND SERVANT (§ II B 4—161)—KNOWLEDGE OF DEFECTS OR DANGER BY SERVANT—KNOWLEDGE ALSO OF STATUTORY DUTY IMPOSED ON MASTER.

Where a statutory duty is cast upon a master in any particular work, the fact that a servant continues in that work with knowledge of its dangerous character and appreciation of the risk thereof, does not render the maxim *volente non fit injuria* applicable so as to absolve the master from liability, unless it is shewn that the servant undertook the employment not only with knowledge of the risk involved, but also of the master's statutory duty in respect thereto. (*Per* Galliher, J.A.)

APPEAL by plaintiff from judgment of Gregory, J., dismissing action upon the jury's answers to questions submitted to them.

The appeal was dismissed.

S. S. Taylor, K.C., for appellant.

Sir *C. H. Tupper*, K.C., for respondents.

MACDONALD, C.J.A.:—The action was dismissed at the trial on the ground that the jury cauld not properly find that the plaintiff had not been guilty of contributory negligence. After a perusal of the evidence, particularly that of the defendants' transmaster, I am of opinion that there was sufficient upon which the jury could find as they did; that the plaintiff was not guilty of contributory negligence. Brakemen were allowed to, and made a constant practice of riding on the ladder on the side of the car, and this seems to have been recognized by the officials as proper and convenient to enable the brakemen to perform their duties efficiently. The fact that the plaintiff inadvertently failed to remember the danger on this occasion does not in the circmstances of this case disentitle the jury to acquit him of contributory negligence, and if this were the only question involved in the appeal, I should reverse the judgment dismissing the action, and give judgment to the plaintiff.

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The difficulty, however, in the plaintiff's way is the existence of an order of the Board of Railway Commissioners, dated February 2, 1910, approving the plan of water stand pipes which shews the distance they are to be placed from the centre of the railway track, namely, not less than 7 feet 6 inches. It was, I think, proved satisfactorily that the stand pipe which injured the plaintiff was of this standard type, and was placed not less than 7 feet 6 inches from the centre of the track. The jury found that defendants' negligence consisted in having this water stand pipe too near to the track. It therefore follows that if it were placed there with authority equivalent to statutory authority, and if the authority has not been withdrawn or displaced by the subsequent order, which I shall presently mention, the plaintiff could have no right of action. The subsequent order relied on by the plaintiff is dated November 9, 1910, and it provides that "water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab." It appeared that the water stand pipe in question was less than that distance from the widest engine cab. No evidence was adduced to shew that either of these orders was promulgated pursuant to sec. 31 of the Railway Act, but no objection was taken by counsel to their admission in evidence on that account. That section provides that any order or decision of the Board published by or with the leave of the Board for three weeks in the *Canada Gazette*, and while the same remains in force, shall have the like effect as if enacted in the Act, and that all Courts shall take judicial notice thereof. What effect failure to prove such publication might have upon this case it is not necessary here to consider because no objection was taken either at the trial, or on the appeal, based upon said sec. 31, and the trial seems to have proceeded on the assumption that both orders were in full force and effect except as the earlier one might be affected by the later.

The plaintiff's contention is that the order of November overrides the one of February, while the defendant contends that the order of February being a special and that of November a general one, the later order has no application to the water stand pipe in question here. I think that the defendant's contention is right. The order of November, if I may say so, is very loosely drawn. On its face it appears to have been made *ex parte*. If it were intended to be retroactive, or to conceal the previous order, one would expect that the defendant and all other railway companies affected thereby would have been notified of the pro-

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posal to make it. It was not a weighty matter to decide and direct that all water stand pipes should in future be erected at a specified distance from the tracks, but to direct that all such pipes already erected along many thousands of miles of railway should, instanter, where they were within that distance, be removed and made to comply with the order, was a serious matter, and while uniformity is important in securing safety, yet if so sweeping a change were intended, one would expect that reasonable time would be allowed to enable the railway companies to make the change. The language used in the order is peculiar, and I find some difficulty in construing it. It seems to me to be open to the construction that in future water stand pipes shall not be erected nearer than a specified distance from the tracks, but it is also capable of the additional meaning that all existing stand pipes which are less than that distance from the tracks shall be removed. Having regard, however, to the considerations above referred to, I cannot think it was the intention of the Board to do more than direct that in future the terms of that order should be complied with. In other words, it was not intended to be retroactive. On this point the position of the C. P. R. Co. is perhaps stronger than that of other railway companies, because of the order of February. Had it been the intention of the Board to rescind that order, I think it would have been so expressed in the order of November. In this view of the case, even apart from the maxim, *generalia specialibus non derogant*, the November order cannot be successfully relied upon in aid of the plaintiff.

It follows that the appeal must be dismissed.

IRVING, J.A.:—The action was for damages sustained by the plaintiff, a brakeman on a freight train, on November 24, 1910, by striking a stand pipe erected close to the track upon which the train was running.

The Judge permitted the case to go to the jury for precaution's sake: see *Bridges* v. *North London R. Co.* (1873), L.R. 7 H.L. 213, at p. 235.

The jury found that the defendants were guilty of negligence, viz., permitting the stand pipe to be too close to the track, and that the plaintiff was not guilty of contributory negligence.

In answer to question 5, the jury found that the plaintiff could not, by the exercise of reasonable care, have avoided the company's negligence.

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In answer to Q. 8:—

Did the plaintiff know of the risk due to the position of the standpipe, and have a knowledge and appreciation of its danger, and had he at the time of the accident voluntarily accepted the risk as a risk incident to his employment?

(*a*) The plaintiff knew of the risk due to the position of the standpipe, but under the circumstances couldn't appreciate the proximity of the pipe.

(*b*) Yes.

On these answers the learned Judge ordered judgment to be entered for defendants.

By sub-sec. (*g*) of sec. 30 of the Railway Act, ch. 37 of Rev. Stats. Can., 1906, the Board of Railway Commissioners is authorized to deal with the structures and works to be used by the railway, so as to protect the employees of the company.

Under that section the defendant company obtained on February 2, 1910, an order approving of a system of stand pipes to be erected on their road not less than 7 feet 6 inches from the centre of the track.

The stand pipe in question was erected in compliance with the requirements of that plan.

Prior to the passing of that order, a general order (p. 135) had been made (December 16, 1908) with reference to all railways in Canada, requiring the water stand pipes to be fastened parallel with the main track; and on November 9, 1910, that general order was repealed and a new general order, providing that the water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab, was promulgated.

This pipe is only 16½ inches from the widest part of engine No. 575, so that judged by the standard of the order of November 9, 1910, it is 13½ inches too close.

The learned Judge, on motion for judgment, came to the conclusion that the plaintiff was the author of his own injury irrespective of whether the stand pipe was placed in a dangerous position or not, and gave judgment for the defendants, following *Dominion Iron & Steel Co.* v. *Day* (1903), 34 Can. S.C.R. 387; and *Ryan* v. *Canada Southern R. Co.*, 10 O.R. 745. Both of these cases are illustrations of the rule laid down by Lord Cairns in *Dublin, Wicklow & Wexford R.* v. *Slatterly* (1878), 3 A.C. 1155, at 1166, that in certain cases a defendant is entitled to have a direction to the jury to find a verdict for the defendant. This right was recognized by the Judicial Committee in *Toronto R.*

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Co. v. *King,* [1908] A.C. 260, at 269. I do not wish to express an opinion as to whether or not this was a proper case for the exercise by the Judge of that duty, and it is not necessary for me to do so, because I have come to a conclusion on another point, and that is, there was no evidence of negligence on the part of the company to go to the jury.

In *G. T. R.* v. *McKay* (1903), 34 Can. S.C.R. 81, the Supreme Court of Canada considered the 187th section of the Railway Act (now sec. 30 of ch. 37, R.S.C. 1906) and it was there laid down that the standard of duty, if complied with by a railway company, cannot be regarded by a jury as negligence. Compare *C. P. R.* v. *Fleming* (1893), 22 Can. S.C.R. 33.

The defendant company, in my opinion, were governed by the special order of February 2, 1910, and not by the general order of November 9, 1910.

The general order of November 9, 1910, provides art. 8, that (*a*) open drains shall be forthwith covered up; (*b*) that in future semaphores shall not be nearer than 6 feet from the nearest rail, and that existing semaphores shall be changed so as to comply with this article within two years; (*c*) enacts that "no structure over 4 feet high shall hereafter be placed within 6 feet from the nearest rail without first obtaining the approval of the Board; (*e*) water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab.

I read (*e*) with (*c*) that in placing a stand pipe hereafter it shall be at least 6 feet from the gauge side of the nearest rail, and if the engine cabs are so wide that this will not give a 2 feet 6 inches space between the stand and the engine, then they must be put back even a greater distance.

It is not to be overlooked that sub-sections (*b*) and (*c*) both deal with the erection of semaphores and structures to be erected; and no provision is made in (*e*) for the removal of existing stand pipes, although we find in (*d*) a time limited for the removal of existing switches, etc. The circumstance that the general order of November, 1910, was to come into force at once, and a penalty was given for every offence, goes to shew that the immediate removal of the stand pipes sanctioned by the special order of February 2, 1910, and the erection of another, was not contemplated.

There is another argument which perhaps is convincing, namely, that the Board, having by the special order prescribed a special minimum measurement for the C. P. R. stand pipes of

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7 feet 6 inches from the centre of the track, to meet the requirements of the rolling stock used by that company, were not in November, 1910, dealing with the C. P. R. at all. This argument seems to me not as strong as the one I have put forward, because the general order is remedial in its nature.

GALLIHER, J.A.:—This is an action for damages for injuries sustained by the plaintiff in the loss of his right hand.

The plaintiff was a brakeman in the defendants' employ, and on the night of November 24, 1910, while in the performance of his duties in the yard at Spence's Bridge, a point between North Bend and Kamloops, on the defendants' railway, the wheels of the freight car ran over his right arm, cutting off the hand above the wrist. The only evidence as to how the accident occurred is that of the plaintiff, who swears that he was riding on the ladder on the side of the box car which he was ordered to cut off from the train and switch on to a siding in the yard. That while so riding, the night being dark and the yard badly lighted, he did not see the water stand pipe erected close to the track, and while passing was struck by this stand pipe and knocked under the wheels of the car, suffering the injury complained of. The plaintiff's case is that the stand pipe was placed so near the track as to be dangerous to brakemen, and to the plaintiff in carrying out his duty, and that the placing or maintaining of the stand pipe in that position was contrary to an order of the Board of Railway Commissioners, dated November 8, 1910. The defendants set up: (1) Contributory negligence; (2) *volens;* (3) that the order of the Board of Railway Commissioners was not retroactive; and (4) that they were not negligent in that the said Board had by an order of February 2, 1910, permitted the defendants' stand pipes to be in the position and within the distance from the track in which the stand pipe in question was. The question of contributory negligence was left to the jury, and they found in favour of the plaintiff. Such being their finding, and in view of the circumstances disclosed in the evidence, I am unable to say that there was not evidence upon which they could so find; and I also am of opinion that it was a case where the evidence was properly submitted to the jury upon that point.

If the defendants committed a breach of a statutory obligation in connection with this stand pipe, that would be no answer to a plea of contributory negligence; but in the application of the maxim, *volenti non fit injuria,* it might be quite different. In the case of *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, Bowen

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and Fry, L.JJ., expressed the opinion (though it is only *dicta*) that where a statutory duty exists, and a breach is committed, the maxim, *volenti non fit injuria,* is not to be presumed to avail (the Master of the Rolls expressing a different opinion) and in the later case of *Baddeley* v. *Earl Granville,* 19 Q.B.D. 423, Wills and Grantham, JJ., both expressed the opinion that under such circumstances the maxim does not apply. In any event it appears to me that where a statutory duty is cast upon a master in any particular work, the fact that the servant continues in that work even if he knows its dangerous character, and appreciates the risk he is running, does not make him *volens* unless it is brought home to him that he undertook the employment not only with the knowledge of the risk involved, but of the master's statutory duty in respect thereto, and if such knowledge is not brought home to him, and the master commits a breach of that statutory duty, he is not discharged from his liability to compensate the servant for injuries sustained through such breach of duty.

Here there has been no attempt to shew that the plaintiff had any knowledge that the defendants were under any statutory obligation to have these stand pipes a certain distance from the track, so that in that sense he could not be said to be *volens* so as to take him out of the protection afforded by statute. Subsection (*e*) of the order of November 9, 1910, in so far as it affects this case, is as follows:—

"Water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab."

The order of the Board of February 2, upon which the defendants rely, provides that the distance at which the stand pipes shall be placed, measuring from centre of track to centre of stand pipe, shall not be less than 7 feet 6 inches. The particular stand pipe in question complies with this, but applying the measurement as specified in the order of November 9, the stand pipe does not conform to that standard.

Two questions are raised in connection with these orders, first, is the order of November 9 retroactive? and second, if it is so, are the company protected by the order of February 2? It has been laid down that legislation is not retroactive unless it says so in express words, or unless it can be inferred from the language of the Act. We have been referred to the case of *Village of Joachim de la Pointe Claire* v. *Pointe Claire Turnpike Road Co.,* 24 Can. S.C.R. 486, but this case does not assist us very much.

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In that case the words used were "the company cannot, however, place any toll or other gate within the limits of any town or village incorporated by special charter or under the municipal code unless the corporation consents thereto." The words so used clearly could not be considered so as to have reference to existing toll gates. The words in the order of November 9, however, appear to me to be very different, and wide enough to include not only placing but maintaining stand pipes, and if this view is correct, it would have reference to every stand pipe, whether already existing or to be afterwards erected. It seems to me there is a direct prohibition that no water stand pipe shall be nearer than the prescribed distance. It may be said that such an order coming into effect at once would be unreasonable, and that the company should, at all events if the order was intended to apply to existing stand pipes, have been given a reasonable time within which to make all existing stand pipes conform to the order. That may be true, but we have to interpret the order as we find it without regard to whether it may be reasonable or unreasonable, but it is of course an element that ought to be considered in deciding whether the order was retroactive or not. If this sub-section stood alone, I am inclined to think the order would be retroactive, but I think sub-section (*c*) of section 8 of the same order must be considered and read with sub-section (*e*). This reads as follows:—

> "No structure over four feet high shall hereafter be placed within six feet from the gauge side of the nearest rail without first obtaining the approval of the Board."

Now a stand pipe is a structure and comes within the general class in sub-section (*c*), and the Board have in effect said in sub-section (*e*), notwithstanding what is said generally in sub-section (*c*) as to distance of structures from rail; in the case of water stand pipes a distance which may be different is fixed, leaving the word "hereafter" in sub-section (*c*) to govern.

If I am wrong in this conclusion it remains to consider whether the company, having obtained the order of February 2, is exempt from the provisions of this order. By virtue of the Railway Act, Con. Stats. of Canada, 1906, section 30, sub-section (*g*), the Board may make orders and regulations with respect to the rolling stock, apparatus, cattle guards, appliances, signals, methods, devices, structures and works to be used upon the railway, so as to provide means for the due protection of property, the employees of the company and the public, and by

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sub-section 2 of said section 30, "Any such orders or regulations may be made to apply to any particular district or to any railway or section or portion thereof, and the Board may exempt any railway or section or portion thereof from the operation of any such order or regulation for such time or during such period as the Board deems expedient."

It seems to me under these provisions the Board would have power to fix a standard such as was fixed in the order of November 9, and exempt from this standard either in the same order or in a separate one the present defendants.

In the present case, however, the special order of February 2 confirming plans of the defendants with regard to water stand pipes is prior in date to the general order, and as in the general order there is no exception or exemption, we are called upon to decide whether the general order over-rides the special order.

A general later order does not abrogate an earlier special one by mere implication: *Kutner* v. *Phillips,* [1891] 2 Q.B. 267.

In *London & Blackwall Ry. Co.* v. *Limehouse District Board of Works,* 3 K. & J. 123; 26 L.J.Eq. 164, Vice-Chancellor Sir W. Page Wood, says:—

> I confess I entertain a strong opinion on the law applicable to this railway company's special Act, with which the local commissioners are seeking to interfere. Whenever the legislature has, by such an Act, vested powers of a special character in a corporate body or any body of commissioners, for the express purpose of carrying out a particular object which the legislature has in view, no subsequent statute, in merely general terms giving powers which by their generality apply to the special powers conferred by the former Act, will override the special powers thereby delegated to the particular body of commissioners or corporation.

While perhaps not on all fours, it seems to me the principle in this case is applicable to the case at bar if we are to apply the same principle to the orders of the Railway Board as is applied to statutory enactments.

Mr. Taylor, counsel for the appellant, however, urged that the approval of the C. P. R. plans in the order of the Board of February 2 goes no further than permitting stand pipes already erected to remain as constructed, and is therefore under their supervisory powers and not under the legislative powers as the general order is.

I do not think this can prevail when we consider the effect of sub-section 2 of section 30 of the Railway Act above referred to, and any order confirming a standard for water stand pipes

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of any particular railway system made under the powers therein granted would be as much within the legislative powers of the Board as would a general order.

It follows, therefore, that as the stand pipe in question conforms to this order of February 2, by which the defendants are protected, they are not guilty of negligence, and the plaintiff's appeal must be dismissed.

I merely desire to add that there was no evidence adduced to shew that these orders of the Board had been promulgated, but as neither side took objection, and the whole matter was argued before us as if they had, I have so dealt with the case.

Appeal dismissed.

STONE v. CANADIAN PACIFIC R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 4, 1912.

1. MASTER AND SERVANT (§ II C 2—199)—LIABILITY OF RAILWAY COMPANY —CONTRIBUTORY NEGLIGENCE OF SERVANT—COUPLING CARS.

It is contributory negligence for a brakesman, while standing with one foot on a loose step on the side of a box car 6½ inches below the bottom thereof, and with one hand holding a rung of a ladder on the side of the car 14 inches above the bottom of the car, to attempt to open the coupling device by working the lever that operated it, the end of which was about 15 or 16 inches from the side of the car.

2. TRIAL (§ II C 8—146)—NEGLIGENCE OF RAILWAY—QUESTIONS FOR JURY.

Where the jury omitted to answer a direct question submitted to them on the trial of a railway employee's action against the railway for damages for negligence causing personal injury as to whether there was negligence on the part of the plaintiff or of the defendant company or of both, their negative answer to another question as to whether the car was reasonably safe for the employees, which latter question was not directly pointed at the alleged defects leading to the injury, is not alone a finding of negligence and is insufficient to support a verdict for plaintiff.

3. CARRIERS (§ IV A—518b)—GOVERNMENTAL CONTROL—EQUIPMENT OF FREIGHT CARS—FOREIGN CARS INTERCHANGED—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 264.

Sub-sec. 5 of sec. 264 of the Railway Act which requires "all box freight cars of [a railway] company" to be equipped with outside ladders on the ends and sides thereof, applies only to cars owned by the defendant company and not to those of a railway company operating in the United States, that were received by the defendant in interchange of traffic under sec. 317 of the Railway Act.

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4. MASTER AND SERVANT (§ II C 2—199)—CONTRIBUTORY NEGLIGENCE—ABSENCE OF LADDER FROM END OF FOREIGN RAILWAY CAR—STATUTORY CONDITION.

A verdict for the defendant should be directed where the evidence shews that the plaintiff, a brakesman in the former's employ, received an injury as the result of his own carelessness while attempting to couple cars, and not as the result of the absence of a ladder from the end of a car that, in the interchange of traffic, under sec. 317 of the Railway Act was received by the defendant from and was owned by a railway company operating in the United States, which was not shewn to be under any obligation, statutory or otherwise, to maintain ladders on the ends as well as the sides of its box freight cars.

5. CARRIERS (§ III J—486)—EQUIPMENT OF FOREIGN FREIGHT CARS—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 261.

Notwithstanding that sec. 261 (1) of the Railway Act requires every railway company to provide cars with couplers coupling by impact, that can be uncoupled without the necessity of men going between the ends of cars, the fact that a car, which in the interchange of traffic, under sec. 317 of the Railway Act was received from and was owned by a railway company operating in the United States, had an operating lever on its coupling device which was shorter than those on cars owned by the defendant, is not a defect so as to render the defendant liable for injuries sustained by a brakesman while attempting to couple it, since cars with short levers were constantly being received and passed in the ordinary course of inspection.

6. MASTER AND SERVANT (§ II C 2—199)—CONTRIBUTORY NEGLIGENCE—COUPLING CARS.

The fact that a box freight car was not equipped with ladders at the ends as required by sub-sec. 5 of sec. 264 of the Railway Act, will not render a railway company liable for injuries sustained by a servant while attempting to couple cars, where the absence of such ladder was not the contributing cause of such injury.

7. NEGLIGENCE (§ I A—1)—BASIS OF ACTION—ABSENCE OF NEGLIGENCE ON PART OF DEFENDANT.

A verdict for the plaintiff for injuries received while in the employ of a railway company cannot be sustained where neither the evidence nor the answers of the jury to questions submitted them disclose, on the part of the defendant, negligence that contributed to the plaintiff's injury.

THIS is an appeal by the defendants from a judgment entered by the Chancellor of Ontario, upon the answers of the jury at the trial, awarding the plaintiff $6,000 damages for injuries received while in the defendants' employment as a brakesman. The plaintiff was endeavouring to effect a coupling between two box freight cars, at or near Bolton Junction, a station on one of the defendants' lines of railway, and, while doing so, was either shaken off or fell from a ladder affixed to the side and close to the end of the car upon which he was riding, and one of the wheels passed over his right arm, necessitating amputation. The box freight car in

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question was not the property of the defendants, but had been received and was being hauled over their lines under the interchange of traffic provisions of the Railway Act. It had been received by the defendants at Detroit from the Wabash Railroad Company on the 14th March, 1911, loaded with merchandise for various points on the defendants' lines of railway, and on the 18th March it was in course of return to Detroit, *viâ* Toronto Junction, as part of one of the defendants' regular way-freight trains, when the accident happened.

The plaintiff attributed the accident to three causes: (a) the ladder being defective because the lowest step, or the step which was placed below the bottom of the car, was not joined to the rest of the ladder, but was separate and attached to the bottom timbers of the car and was loose and insecure; (b) there was no ladder on the end of the car close to where the side ladder was; and (c) the coupling-rod used for controlling the action of automatic couplers, when about to effect a coupling of cars, did not extend outward from the couplers to the side of the car, or within a short distance from it, but was so short as to necessitate the going in between the cars, or at all events to render it necessary to reach very far beyond the side of the car in order to get hold of it.

The defendants denied all liability, and witnesses were examined on both sides. At the conclusion of the plaintiff's case, counsel for the defendants moved for judgment on the ground that no case of negligence had been shewn, but the learned Chancellor declined to withdraw the case from the jury. The motion was renewed at the conclusion of the whole case and again denied.

The learned Chancellor submitted to the jury a number of questions which with the answers returned are subjoined, *viz.*:—

1. Was the car in question owned by the C.P.R. or by another company? A. Owned by another company.

2. Was the car and its fittings reasonably safe for the employees of the C.P.R., in the usual operations of the road? A. We think not.

3. Was the plaintiff, having regard to all the circumstances, in his method of arranging the gear for coupling the cars, acting according to good and proper practice? A. Not having received circular No. 4, we think he acted to the best of his knowledge.

4. If not, wherein did he err?

5. Was the plaintiff injured in consequence of any defect in the make-up of the car? A. Yes, in our opinion we think he was.

6. If he was so injured, state everything which you find to be wrong. A. The car in question lacked the ladder on end of car

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and long lever equipment used by C.P.R., in which company he was employed.

7. Could the plaintiff, by the exercise of reasonable care, have provided for the coupling of the cars with safety to himself? A. In our opinion, not under the circumstances.

8. Do you find negligence as to the matters in dispute?

(a) In the C.P.R.?

(b) In the plaintiff?

(c) Or, in both of them?

9. If so, state briefly what was the negligence in each case.

10. If the plaintiff is entitled to damages, state how much. The jury have agreed on $6,000 for damages for plaintiff.

Upon the answers judgment was entered for the plaintiff for $6,000.

The defendants now appeal, contending that the plaintiff is not entitled to recover damages against the defendants; that, if entitled to any judgment, the damages should be limited to the amount recoverable under the Workmen's Compensation for Injuries Act; and that, in any event, the damages awarded are excessive.

I. F. Hellmuth, K.C., and *Angus MacMurchy*, K.C., for the defendants. The learned trial Judge should have given effect to the motion for nonsuit at the close of the plaintiff's case, or at least upon the whole case he should have told the jury that no liability had been made out. There was no breach of any statute by the defendants. Unless the provisions of sec. 264 of the Railway Act, R.S.C. 1906, ch. 37, apply, there appears to be no rule against the transport of foreign box freight cars. The car in question was not in contravention of that section. It was received in the ordinary course of the obligation to interchange traffic, imposed by sec. 317 of the Railway Act, and was properly inspected. The evidence shewed that the accident was caused, not by the negligence of the defendants, but by that of the plaintiff, and that he was the author of his own injury. His position on the ladder was not a proper one, and was an unauthorised and a dangerous one. He should have signalled the engine-driver to stop, and then got down and made the coupling from the ground. At any rate, the jury by their answers have not directly found the defendants guilty of negligence, though they have found that the Wabash car was defective. There was no evidence on which a jury could reasonably find that the alleged defects pointed to in the answers to questions 5 and 6 were the proximate cause of the

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accident. There was no evidence to justify the answer to question 7. There was neither statutory nor common law liability. In any event the damages are excessive.

A. E. H. Creswicke, K.C., and *Christopher C. Robinson*, for the plaintiff. The judgment below should be affirmed. The findings of the jury which bear upon the questions of negligence and contributory negligence are amply supported by the evidence, and should not be disturbed. The evidence and findings of the jury shew clearly that the defendants were guilty of a breach of their statutory duty under the Railway Act, and that such breach was the cause of the accident. See sec. 264 (*c*), and sub-sec. 5; *Durant* v. *Canadian Pacific R.W. Co.* (1909), 13 O.W.R. 316; *Scott* v. *Canadian Pacific R.W. Co.* (1909), 19 Man. L.R. 165. In everything but the ladders, the Act deals with the train, the ladders being dealt with in reference to "cars." Therefore, the statute applies to the coupler, whether the cars are foreign or not. In reference to sec. 256 of the Railway Act, see *Atcheson* v. *Grand Trunk R. W. Co.* (1901), 1 O.L.R. 168, and MacMurchy and Denison's Railway Law of Canada, 2nd ed., p. 410. As to secs. 284 and 317, no company is bound to accept cars unless properly equipped: *Richardson* v. *Great Eastern R.W. Co.* (1876), 1 C.P.D. 342. On the question of contributory negligence, we submit that on a plea of "not guilty by statute" that question is not open. *Doan* v. *Michigan Central R.W. Co.* (1890), 17 A.R. 481, is not conclusive. The jury have found against contributory negligence: *Canadian Northern R.W. Co.* v. *Anderson* (1911), 45 S.C.R. 355.

Hellmuth, in reply. We are not obliged to plead contributory negligence.

April 4, 1912. Moss, C.J.O. (after setting out the facts as above):—Upon all the facts disclosed in evidence, and having regard to the circumstances under which the plaintiff met with the injury, I think that, if I had tried the case without a jury, I should have had no hesitation in holding that the plaintiff had not succeeded in fastening liability upon the defendants. But, the case having been submitted to the jury, and their answers to the questions being now before us, there arise for consideration the questions: (a) whether there was evidence proper to submit to the jury upon the questions of negligence on the part of the defendants; and, if so, (b) whether, upon the answers, judgment should not have been entered for the defendants.

The plaintiff, a young man twenty-two or twenty-three years of age, who had been for over five years in the employment of the

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Canadian Express Company, but in what capacity does not appear, though it may be inferred that it was work in connection with railways, and was subsequently employed by the Grand Trunk Railway Company as a brakesman for six months, entered the defendants' employment as a spare brakesman on the 20th August, 1910, and continued in that capacity, though not engaged all the time in actual work, until the date of the accident, on the 18th March, 1911. On that day he was engaged as brakesman on a freight train with the box freight car in question as one of the cars. At Bolton Junction it was necessary to detach a car which was to be left there, and it was cut out by means of a running shunt. After performing that and some other operations, the next step was to unite the remainder of the cars, which were to go on to Toronto Junction. The car in question—called the Wabash car—was to couple with a car some distance from it on the line. The plaintiff, as his duty required, went upon the roof to signal the engineer to back down to the other car. When the engine was moving the Wabash car down towards the other car, the plaintiff, according to his testimony, observed that the coupler on it was closed—that is, that the knuckle was not in a position to effect a coupling with the Wabash car unless the knuckle or its coupler, which was also closed, was opened.

In order to open this knuckle, the plaintiff went down the ladder on the side of the Wabash car, near the end which was approaching the other car, with the intention of getting hold of the lever or coupler-rod by which the knuckle was opened or closed, and by lifting it thereby open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and, with his left foot resting on it, and holding on to the lowest rung of the ladder with his left hand, and with his right foot hanging down and swinging in the air, he endeavoured to reach around the end of the car to the lever or coupler-rod. This lever was connected with the top of the coupler, with the rod projecting towards the side of the car on which the plaintiff was. While he was in this position, the car, moving at the rate of about seven miles an hour, passed over a crossing of two tracks, and the jar caused his foot to slip from the bottom step, and he fell with his arm under the wheels. In his evidence he said that the lever-rod projected only some fifteen or sixteen inches from the coupler, which was about four feet from the side of the car, so that the end was about thirty-two or thirty-three inches from the side of the car where he was. He further said that the bottom step was about eleven inches in width, and was loosely and insecurely fastened to the bottom timber of the

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car, besides not being under the ladder but to one side of it, and that the side which was the furthest from the end of the car. In all these respects the testimony adduced by the defendants amply and satisfactorily displaced the plaintiff's contentions. But, as the case stood at the end of the plaintiff's case, the learned Chancellor could not have withdrawn it from the jury if the defendants' negligence rested upon proof of these facts. It was admitted that the Wabash car had not ladders on the ends, as required by sec. 264 (5) of the Railway Act.* The plaintiff, in examination in chief, stated that, had there been a ladder at the end of the car, he would have gone down it, and endeavoured to make the coupling. But on cross-examination he admitted that it was not good railway practice to go down between the ends of two cars to make a coupling when the car was in motion—but, he said, "you see it done every day." It is manifest that such a practice is not only dangerous but is directly opposed to the policy of the law as declared by sec. 264 (*c*) of the Act. He also suggested that, if the ladder had been at the end, he might have saved himself from falling, by catching it; but it is difficult to suppose that he could have seriously believed that that was one of the purposes for which a ladder is required on each end of a car. It was not, however, proved or admitted during the plaintiff's case that the car was not the property of the defendants. And, assuming it to have been the defendants' property, there were the questions whether it was fitted with couplers and ladders as required by sec. 264, and whether the failure to provide them was the cause of the accident, or whether it was due to the plaintiff's own want of care or failure to observe the usual and proper modes of making the coupling. The plaintiff admitted that the proper course would have been

*Sub-sec. 5 of sec. 264 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—

"All box freight cars of the company shall, for the security of railway employees, be equipped with—

(*a*) Outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and,

(*b*) Hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladders:—

Provided that, if there is at any time any other improved side attachment which, in the opinion of the Board, is better calculated to promote the safety of the train hands, the Board may require any of such cars not already fitted with the side attachments by this section required, to be fitted with the said improved attachment."

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to signal the engine-driver to stop, and then get down and make the coupling from the ground, which he could have done. He excused himself by saying that he was on the fireman's side of the car, and that the engine-driver was not looking, and so he (the plaintiff) could not give any signal.

Upon the whole, although scanty, there was enough at the close of the plaintiff's case to justify the refusal to enter judgment for the defendants. But at the close of the whole case, when it had been proved, and indeed admitted, that the car was not the defendants' property, but was owned by the Wabash or some other company, other questions arose as to the liability of the defendants for the failure of this car to comply with all the requirements of sec. 264, applicable to couplers and ladders on box freight cars. The car had been received in the ordinary course of the obligation to interchange, traffic, imposed by sec. 317 of the Railway Act.* It had been inspected in due course and passed in accordance with the ordinary practice, by inspectors whose competency was not questioned. Many hundreds of box freight cars without ladders on each end are received and passed daily, entering Canada from the United States. It is shewn that there is no rule, statutory or otherwise, requiring that there shall be ladders on the ends as

*Section 317 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—

"All companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling stock.

2. Such facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and, in the case of goods shipped by car load, of the car with the goods shipped therein, to and from the railway of such other company, at a through rate; and also the due and reasonable receiving, forwarding and delivering by the company at the request of any person interested in through traffic, of such traffic at through rates.

3. No company shall—

(*a*) Make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;

(*b*) By any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person, or company;

(*c*) Subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever; or,

(*d*) So distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects.

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well as on the sides of box freight cars used on railways operated in the United States. The car was provided with automatic couplers, but the complaint is as to the length of the lever, or coupling-rod. There is no express provision in the Railway Act prescribing the length of the lever, but the testimony for the defendants shewed that the end of the lever on the car extended to within fifteen or sixteen inches of the side, instead of thirty-two of thirty-three inches, as the plaintiff stated. The modern Canadian lever is made to extend out to the side, or to within at least eight inches; but cars from the United States, with the end of the lever fifteen or sixteen inches from the side, are admitted and passed in the usual and ordinary course of inspection. Unless the provisions of sec. 264 apply, there appears to be no statutory or other rule against the transport of foreign box freight cars, although they do not comply in every respect with the Railway Act.

Section 264 (1) enacts that:—

> Every company shall provide and cause to be used on all trains modern efficient apparatus, appliances and means, . . . (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

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4. Every company which has or works a railway forming part of a continuous line of railway with or which intersects any other railway, or which has any terminus, station or wharf near to any terminus, station or wharf of any other railway, shall afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway, all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf.

5. The reasonable facilities which every railway company is required to afford under this section, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by any such company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

6. Every company which grants any facilities for the carriage of goods by express to any incorporated express company or person, shall grant equal facilities, on equal terms and conditions, to any other incorporated express company which demands the same.

7. Any agreement made between any two or more companies contrary to this section shall be unlawful and null and void: 3 Edw. VII. ch. 58, secs. 253, 271, and 278; 6 Edw. VII. ch. 42, sec. 23.

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Assuming the expression "and cause to be used" to comprehend foreign cars in transport over the defendants' lines, the car in question was not open to objection for any defect in the above-mentioned respects.

Sub-section (5) enacts that—

> All box freight cars of the company shall, for the security of railway employees, be equipped with—(a) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached.

The car in question had not ladders on the ends, but it was not a car "of the company." There is a distinction drawn between the couplers to be used on all trains, and the equipment of box freight cars with ladders. The obligation with regard to the latter is confined to cars of the company. The car was, therefore, not in contravention of the sub-section. Even if the contrary were the case, it is clear that their absence in no way contributed to the accident which befell the plaintiff. I think that, upon the whole case, the jury should have been told that no case appeared upon which they could reasonably find that the defendants were negligent, and that no case of liability had been made out; and that the action should have been dismissed.

Assuming, however, that it was proper to submit the case to the jury, is the plaintiff entitled to judgment upon the answers returned to the questions? It is to be observed, in the first place, that the jury failed to return answers to the very pointed and material question on the head of negligence contained in No. 8. But they answer the very general question No. 2, "Was the car and its fittings reasonably safe for the employees of the C.P.R. in the usual operations of the road?" which is not directly pointed at the alleged defects leading to the injury, and a negative answer to which is not a finding of negligence on the part of the defendants.

The answers to questions 4 and 5 bear more directly on the question. They attribute the plaintiff's injury to the fact that the car in question lacked the ladder on the end of the car and the long lever attachment used by the defendants in their cars. But there is no evidence upon which a jury could reasonably find that these alleged defects were the proximate cause of the accident. The plaintiff was endeavouring by using the side ladder not as a means of descending the ladder to the ground and there effecting

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the coupling, as he admits was the proper course, but for the purpose of enabling him, by using the lowest step as a foothold and crouching with his body in a strained and awkward position, to effect the coupling, without stopping the car or getting down to the ground. The position was admittedly an improper, and certainly a very dangerous, one, not authorised to be taken. The method adopted by the plaintiff to endeavour to effect the coupling was the very one most calculated to expose him to danger and risk of injury. And there is no evidence to justify the answer of the jury to the 7th question, an answer which, in its terms, is inconclusive and unsatisfactory. There were no "circumstances" to prevent the plaintiff from adopting the perfectly safe course which he admits he might have done.

Having regard to the evidence in the case, I do not think the answers sufficient to support the judgment entered for the plaintiff; and I think that, notwithstanding them, judgment should have been entered dismissing the action.

The appeal should be allowed, and the action dismissed, with costs if exacted.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—A good deal that has been said and done in this case seems to me to have quite missed the mark which should have been arrived at; for instance, all of that branch of it which deals with the requirements of the statute-law regarding ladders at the ends of "box freight cars." It can make no difference whether there was any such requirement in respect of the "Wabash" car, from which the plaintiff fell, or, if so, whether that obligation was imposed upon the company that owned the car, or upon the company who were using it in the carriage of their freight, or upon the defendant company, who had received, and were forwarding it as interchanged freight only, if as I think, it is incontrovertible that the ladder was not required to be provided for the work in which the plaintiff was engaged when he fell and was hurt; but, on the contrary, that, if he had made use of any such ladder for such a purpose, he would have misused it, contrary to the provisions of the enactment in question, against the wishes and interests of his masters, against his own interests, and against the first instincts of all animals—self-preservation. If he had fallen from such a ladder as he did from the one in question, his life, not only one hand, would have paid the penalty.

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It is quite obvious to any one who has not had, as the plaintiff had, six years' experience in railway matters as a brakesman and otherwise, that it is dangerous to go between cars of any train, and extremely so if they are in motion; and it is equally obvious that that risk should not be taken in any case in which it can reasonably be avoided; quite obvious that it is against the interests of him who does it, of his relatives and friends, and of his employers, as well as against the public interests, that risk of life or limb should be undertaken when there is no occasion for it.

As to his experience, he tells of it in these words:—

Q. You have had no experience in railway matters before you went into the employ of the C.P.R.? A. Yes, sir.

Q. To what extent? What was your experience? A. I had been with the Canadian Express Company for about five or six years, and I was with the Grand Trunk as brakesman.

Q. Passenger brakesman or freight? A. Passenger and freight both.

Q. Then your experience up to the time you quit their employ would be about five or six years, would it? A. Yes, about six years.

In the same section of the Railway Act in which the requirement as to the ladders is contained, it is expressly and plainly required, in the interests and for the safety of just such men as the plaintiff, that automatic couplers, "which can be uncoupled without the necessity of men going in between the ends of the cars," shall be provided, and used, upon cars such as that in question. So that, if such couplers are provided, what possible excuse can there be for going between the cars to uncouple them, not to speak of going between them and doing the work on a perpendicular box car ladder, without any sort of reason for not doing that work from without the cars?

It seems to have been thought necessary, by a learned Judge, to say that you cannot have damages for injury to a finger in the closing of a passenger carriage door, merely because the headlight of the engine, which was drawing the train, was not burning when it should have been; and so it seems to me to be necessary to repeat somewhat frequently the observation that one cannot have damages for any negligence which is not the proximate cause of the injury.

So that really this case depends entirely upon the two questions: (1) whether the defendants were guilty of any negligence in respect of the kind of brake which the plaintiff was attempting to uncouple only; and, if so, (2) whether that negligence was, or whether the plaintiff's want of care in whole or in part was, the cause of his injury.

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The jury have not found any negligence in the defendants; it would be very hard to see how they could. The question was pointedly put to them. The substance of their findings, in so far as they affect this case, is, that the "Wabash" car was "defective" in not having "the ladder on the end of the car and long lever equipment," such as the defendants have upon their own cars; and that, in consequence of such defects, the plaintiff was injured.

The findings are not very consistent, for, if the ladder which was not provided had been provided, and if the plaintiff had used it, he would have had no need of a long lever uncoupling rod. His testimony is, that, if there had been a ladder at the end of the car, he would have used it in uncoupling. A longer rod might have made the task of uncoupling from the side ladder somewhat easier; but possibly less so from an end ladder; the lengthened rod is to enable doing the work without going between the cars.

But there is no evidence that the uncoupling rod did not fully comply with the requirements of the statute, and no finding that it did not; how then can the judgment be sustained? And, as I have before mentioned, there is no finding of negligence on the part of the defendants; and, if there had been, there is no evidence whatever to support such a finding; the plaintiff's case seems to me to be hopeless in this respect; indeed, it may be that the requirements of the enactment, in this respect, are all that the law can require from any company subject to its provisions, whichever company may be the one to which it applies, if it does not apply to more than one of the companies concerned in the making and the movement of the car in question.

In addition to all this, it seems to me to be impossible for any reasonable man to say, conscientiously, that the plaintiff's injury was not caused altogether by his own negligence; and considerably less than that would deprive him of any right to recover.

The statute-law, passed for the especial benefit of persons engaged in car coupling and uncoupling, as a brakesman especially is, shews the impropriety of uncoupling in any manner making it necessary to go between the cars for that purpose. If the plaintiff were a novice complaining of being put at dangerous work without proper instructions, the case might be different; but he was a man of six years' experience "in railway matters;" and is without any sort of excuse for adopting the extraordinary method which he was employing when injured. I cannot but think it likely to bring legal methods into conflict with the commonest of common sense if it can be lawfully determined that the plaintiff was acting

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properly in endeavouring to uncouple cars in motion, from a ladder on the side of the car, too far, according to his testimony, from the end of it, and, according to the same testimony, with a foot-hold too shallow and not wide enough to get both his feet into, and shaky at that, with a coupler rod too short to be operated without danger; and while supported by one foot only upon the loose step, and one hand only upon the rung of the ladder next above that in which his foot was, and only about twenty inches apart, and then making an unduly long reach around the end of the car with his right hand to uncouple; when there was absolutely no need of attempting it, and when so doing was in the teeth of the interest of every one, as before-mentioned, as well as of the enactment already referred to.

It was suggested that the plaintiff should have our sympathy, however unwisely he may have acted, because, it was said, he was taking the risk in his masters' interests and for their benefit; the first part of the proposition I assent to, provided however that such sympathy does not warp the judgment; the latter part is obviously erroneous; there is no kind of evidence of over-zeal on the plaintiff's part in his masters' service; as I have intimated, he did that which was, and he must have known was, against the interests of every one because of the danger of it; he knew that every one's interest required that the uncoupling should be done from the ground without going between the cars and when they were not in motion, and that there was no sort of reason why that course should not be taken; but familiarity with danger breeds contempt of it, and he is not the only man who would not hesitate to take the risk rather than take the additional trouble to stop the train and get down and uncouple and get up again; for, after all, the risk might be undertaken a good many times without a fall, and a good many falls might happen without getting any part of one's body under the wheels; and he is not the only man who is willing to make the trip's work as short as possible and to be home again as soon as possible.

The jury have hedged themselves in, with a shifty answer, from the untrue finding that the plaintiff could not, by the exercise of reasonable care, have uncoupled the cars in safety: "In our opinion, not under the circumstances;" and they quite dodged the question whether that which the plaintiff was trying to do when he fell was "according to good and proper practice," meaning, I suppose, was it a proper method of uncoupling the cars? The jury should have been asked what they meant by "under the circumstances;" if under the circumstances of standing on

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the ladder as he was and attempting to do the work in that way—if they assume that that was proper—there might be some justification for the answer; but that would be entirely begging the question.

I would allow the appeal and dismiss the action.

MAGEE, J.A.:—The plaintiff was brakesman on top of a freight car, at the rear of a train which was being pushed back to be coupled to another car which was stationary. Both cars had automatic couplers—but in order to couple it is necessary that the knuckle of one or other shall be open. He noticed that both were closed. The knuckle, according to the defendants' witness Hawkes, can be opened by the operating lever of a moving car. To reach the operating lever the plaintiff descended the only ladder at that portion of the car. That was a ladder on the side of the car, which appears from the evidence to have been reasonably close to the corner or end.

It is, I think, clear from the evidence that it was customary for brakesmen to operate the levers from the ladders while the cars were moving. It had been done only a few moments before by the other brakesman opening the coupler of the adjoining car to make a flying shunt. The conductor says it was quite customary, and he would not think of reporting a brakesman for doing it, and had never told any one not to do it. The general yard-master, called for the defendants, states that the lever can be operated from the side-ladder.

It is sought to draw a distinction between operating the lever on a moving car in order to uncouple, and doing so in order to couple. But the plaintiff states, and he is not contradicted but indeed borne out by other evidence, that he had plenty of time to do what he was going to do and get around to the side out of the way before the cars would couple. Really all he proposed doing was operating the lever on a moving car. Nowhere do I find that to be forbidden. It was argued that this was contrary to the defendants' circular No. 4 of the 15th February, 1911, which, however, the jury find the plaintiff not to have had notice of. That circular forbids "all acts familiarly known as taking chances," and it calls attention to accidents which had occurred "solely by carelessness on the part of some employee, such as," *inter alia*, "adjusting coupler . . . when cars are in motion." But Mr. Hawkes, the defendants' yard-master, expressly states, as one might expect, that opening the knuckle by the operating lever

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is not "adjusting the coupler." That circular naturally enough puts "adjusting coupler" in the same category with "turning angle-cock or uncoupling hosebags"—all which would have to be done by going between the cars on the ground. But the circular is luminous in respect of several operations. Thus it refers to "accidents from holding on side of car," but only "when passing platform, building, or other obstruction known to be close to track;" "kicking cars into sidings," but only where other cars are standing; and "detaching moving cars" without first seeing to the brakes being in order. This last instance impliedly recognises the practice of detaching moving cars if only the brakes are in order. The plaintiff was injured in an operation not a whit more dangerous than those which are here impliedly recognised, and not at all one which involved the danger of going between cars.

But it seems to me that the plaintiff was not warranted in trying to work the lever from the position which he took, that is, holding with one hand the very lowest rung of the ladder only fourteen inches above the edge of the car, with one foot on the step, only six and a half inches below the edge. He does not shew that there would have been any difficulty in reaching the lever while grasping a rung higher up. Mr. Hawkes considers it quite feasible to have done so, even from the upper rung, which I would doubt, though it is not contradicted. The plaintiff would seem to have been in fact inviting disaster by attempting to reach the lever while in that attitude. There was no compulsion of any sort upon him to do so, either from fear of injury to his employers' property or otherwise. It is simply a case of unnecessary overbalancing, so far as appears—and, however much one may feel sorry for his injury, it cannot, I think, be said to be caused by the defendants' negligence or breach of statutory duty, if there was such duty as to this car of another company.

Appeal allowed.

JONES v. CANADIAN PACIFIC R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.

1. MASTER AND SERVANT (§ II A 4—105)—LIABILITY OF RAILWAY CO.—ENGINEER RUNNING A SNOW PLOUGH—PROCEEDING IN ABSENCE OF CROSSING OR STATION SIGNALS—WORKMEN'S COMPENSATION ACT (ONT.) R.S.O. (1897) CH. 160.

A case for compensation under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, but not a case at common law, is shewn where an engineer in charge of a locomotive propelling a snow-plough ran it for

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some time without ascertaining why crossing or station signals were not being given by the signalman on the plough, and a collision with another train resulted, in which the fireman of such locomotive was killed.

2. DEATH (§ III—20)—RAILWAY FIREMAN—LIABILITY OF RAILWAY—NEGLIGENCE OF ENGINEER—ABSENCE OF SIGNALS—COMMON LAW.

A railway company is not liable at common law for the death of the fireman of a locomotive that was propelling a snow-plough, as the result of a collision with another train, due to the negligence of the engineer in charge of the engine in continuing to run it without attempting to learn the cause of the failure of the signalman on the plough to give crossing and station signals, where no negligence on the part of the signalman was shewn, as the engineer whose negligence caused the accident was the deceased's fellow-servant.

3. APPEAL (§ VII L 2—476)—REVIEW OF FACT—VERDICT AGAINST RAILWAY FOR NEGLIGENTLY CAUSING DEATH—ABSENCE OF EVIDENCE TO SUPPORT JURY'S FINDING.

A verdict of a jury in favour of the plaintiff in an action against a railway company for negligently causing the death of the fireman of a locomotive that was propelling a snow-plough, cannot be sustained where there was no evidence tending to support the jury's finding that his death was due to the negligence of the railway company in operating the plough under a defective system by placing it in charge of a servant who had not passed the necessary eye and ear test, or to shew that the accident was due to a defect in the hearing or vision of such person.

4. COLLISION (§ I—3)—FIXING LIABILITY—DEATH OF RAILWAY FIREMAN ON SNOW-PLOUGH—UNQUALIFIED SIGNALMAN.

A railway company cannot be held liable for the death of a fireman on a snow-plough train as a result of a collision, merely because it employed an unqualified signalman on the snow-plough, where it did not appear that an accident was the result of his disqualification.

5. MASTER AND SERVANT (§ II A 2—47)—DUTY OF RAILWAY IN RESPECT TO RULES AND REGULATIONS—EFFECT OF VIOLATION OF RULES—WHAT MUST BE PROVED BEFORE RECOVERY.

In order to entitle the plaintiff to recover from a railway company for negligently causing the death of a locomotive fireman as the result of a defective system of operating a snow-plough, which was being propelled by the locomotive at the time of the accident, by placing a signalman on the plough who had not passed the necessary eye and ear test, and an examination as to train rules, it must appear that such negligence was the proximate cause of his death.

APPEAL by the defendants from the judgment of Clute, J., upon the findings of a jury, in favour of the plaintiff, the administratrix of the estate of Gilbert Jones, who was an engine-fireman in the defendants' service, and, when acting as such upon a snow-plough train, was killed in a collision, to recover damages for his death. The plaintiff alleged negligence on the part of the defendants.

The questions left to the jury and their answers were as follows:—

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1. Were the defendants guilty of negligence that caused the death of Gilbert Jones? A. Yes.

2. If so, what was the negligence? A. By not having a competent employee in charge of snow-plough train.

3. Did the defendants permit Weymark (signalman) to engage in the operation of the train on which Jones was when he came to his death, without first requiring such employee to pass an examination in train rules and undergo a satisfactory eye and ear test by a competent examiner? A. Yes.

4. Did the plaintiff suffer the damage complained of thereby? A. Yes.

5. Did the deceased come to his death by reason of the defendants operating the railway by a negligent system? A. Yes.

6. If so, what was the negligent system? A. By allowing Weymark to operate snow-plough train without having passed the eye and ear test.

7. Might the deceased Gilbert Jones have avoided the accident by the exercise of reasonable care? A. No.

And the jury assessed the damages at $6,000, for which sum judgment was given in favour of the plaintiff with costs.

The appeal was allowed and a new trial ordered.

I. F. Hellmuth, K.C., and *Angus MacMurchy,* K.C., for the defendants.

Sir George C. Gibbons, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A.: —There was, in my opinion, a mistrial of this case; it was not presented to the jury as it should have been; and, consequently, the jury's findings are inconclusive. No objection was made, on either side, in this respect; and so it may fairly be said, as it was in the plaintiff's behalf, that the verdict ought to be sustained, and held to be sufficient to support a judgment in the plaintiff's favour, if, in any way, reasonably it can. But I am unable to find any such way; or to understand how anything more can be done for the plaintiff than to direct a new trial, if she remains unwilling to accept the judgment which the defendants are willing she should have.

Liability under the Workmen's Compensation for Injuries enactments is admitted by the defendants; and was, I think, conclusively proved through the negligence of the engineer in charge of the locomotive engine which was propelling the train. Although signals had been regularly given by the signalman

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on the snow-plough until the first highway level crossing after passing Schaw station was passed; no signal of any character came from the snow-plough from that on until the accident; none for any other of the level highway crossings; none though the train ran through McRae station; and none for Guelph Junction station, though the train had passed both distant and near semaphores, and was in the station-yard, when the accident occurred.

Failing to get from time to time the signals which should have come from the snow-plough, what possible excuse can the engineer, or indeed the conductor, have for forging ahead over level crossings, past one stopping-place, and into the yard of the next, without making the least effort to learn the cause of such obvious and dangerous failure to give the necessary warnings of the approach of the train, a train not running on "schedule time," and a snow-plough train at that? The engineer must have known that something was wrong: and there should have been signals from time to time; even if he were blind, he must have known that. The difficulty which the findings occasion are primarily the result of insufficient questions; the jury were not asked whose negligence was the proximate cause of the disaster. No just judgment can be given, in the plaintiff's favour at all events, until the real cause of the accident has been found. If it were, as the defendants admit, the negligence of the engineer, the damages awarded by the jury must be reduced; if it were negligence on the part of the signalman, not arising from defective hearing or eyesight, a mere question would arise as to the measure of such damages—whether they are limited under the enactments I have mentioned or not—if the plaintiff would be entitled to any.

It may be that the crucial question was avoided in the fear that it might involve a finding under which the plaintiff would be limited to damages under the enactments; but, whether so or not, this case is another one illustrating the needs for conformity with the usual questions aimed at eliciting all the material facts, irrespective of what the legal result of the whole truth may be.

The jury were evidently under the impression that the employment of an unqualified signalman made the defendants answerable for all the mishaps of the train arising in any way from want of proper signals from him; a view which, instead of being dispelled, may, I fear, have had some sort of encourage-

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ment from the trial Judge, his charge upon the more vital part of it being in these words: "As I understood the argument of the defence upon that point, it was suggested that, even although there might be (he did not admit that there was) a breach of that rule, yet it was not the breach of that rule which caused the injury which caused the death; that the death was not the natural result, was not the proximate cause. Well, that is for you to say. Should that train have been sent out at all, if you find it was not under competent management? Should they have directed or permitted Jones to go out with that train, if it was not properly manned? Did it devolve upon them, if they chose to disregard the order of the Board, to see that no accident should occur? Did they not, in fact, assume the risk of a safe conveyance of their servant, if they chose to disregard the order of the Board which directed what was to be done for that safety?"

That, I have no doubt, contains a good deal of misdirection, and misdirection which has a bearing upon the question of a new trial, even though misdirection not objected to.

The jury ought to have been plainly told that a mere breach of the rule did not give a right of action under it, that there must not only be a breach of the rule, but also injury flowing from it, to give a right of action such as this. They ought to have been plainly told, if they were told anything upon the subject, that, unless the accident was caused by the incapacity or negligence of the signalman, the plaintiff had no right of action under the rule.

The jury did not find that the accident was caused by any such incapacity or negligence; and so the verdict which is based upon the rule alone cannot stand. I cannot think that they meant to find that either the hearing or sight of the signalman was defective; but, if they did, there was no evidence upon which reasonable men could so find. They make no distinction between sight and hearing; the ear test is as prominent in their findings as the eye test; and yet it is very plain that the signalman was not deaf; if he had been, all who came in contact with him would have known it; and it is also obvious that defective hearing could not have had anything to do with the accident. But it was argued that the man may have been colour-blind; if he were, some attempt at least should have been made to prove it; it is not likely that it could have existed in a railway servant without some one knowing something about it in some way—his

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wife, his relatives, and his fellow-workmen; the examination which he did pass is opposed to any such notion; so, too, as to colour-blindness being the cause of the accident; colour-blindness would not have prevented his seeing the colourless highway, the semaphores, switches, and buildings, all calling for a signal which was not given. Colour-blind or not, he could have seen the semaphores; and, no matter what he might have deemed the colour of their lamps, it was equally his duty to signal the approach to Guelph Junction station. Whatever, then, may have been the cause of silence at these points, and at the highways, it was not colour-blindness. So that in these two respects there was not only no reasonable evidence, but, in my opinion, not a scintilla of evidence.

If there had been any reasonable evidence that colour-blindness was the cause of the accident, and if the jury had found that it did cause it, the judgment in the plaintiff's favour—subject to any question as to excessive damages—ought to stand; whilst, if there were reasonable evidence that the accident was caused by some negligence of the signalman, apart from any want of qualification required by the rule, and if the jury had found that it was so caused, the question would arise whether the plaintiff's damages—if entitled to any—should be limited, under the enactment I have mentioned, or not; a question better not dealt with until it necessarily arises. But neither is the case.

Upon the whole evidence, it might reasonably be found that the accident was not caused by any want of qualification or negligence on the part of the signalman; and in that case the defendants' liability would be limited, because, as the defendants admit, the accident was caused, not by any breach of the rule, which it is admitted has the effect of an enactment, but by the negligence of the engineer, a fellow-workman in common employment with the man in respect of whose death this action is brought.

It is quite within the range of possibility, if not extremely probable, that the failure to signal after the last of the series of signals, duly given from Woodstock to the first highway after passing Schaw, was caused by some injury to, or displacement of, the signalling machinery, which the signalman had not power to correct, or indeed may possibly not have known of, on account of the noise of the snow-plough in which he was cooped up; or it may be by reason of some accident or illness suddenly incapacitating the man; things which shew the gross want of care on the

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part of him who had control of the motive power of the train in the engine, as well as of the conductor of the train.

The plaintiff, having failed to establish a claim at common law, as it is called, might, in strictness, have her action dismissed if she refuse to accept—as she does—the offer of judgment under the Workmen's Compensation for Injuries Act; but that would be a harsh method of procedure; for the Court, as well as the parties, is to blame for the failure to elicit at the trial all the facts needful for a consideration of the plaintiff's claim in all its aspects.

I would, therefore, allow the appeal; and direct a new trial. The plaintiff should pay the costs of this appeal in any event: the other costs wasted may not unfairly be costs in the action.

New trial ordered.

NOTE:—This case has been appealed to the Judicial Committee of the Privy Council.

ALBO v. GREAT NORTHERN RAILWAY CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. CARRIERS (§ III C—387)—PROVISION IN BILL OF LADING FOR PROTECTING GOODS AGAINST FROST—ONUS ON CONNECTING CARRIER.

Where, under a bill of lading which required protection of goods from frost, a carrier has had possession, for an unreasonably long time during very cold weather, of a consignment of figs, which were found to be frozen upon arrival at their destination, a *primâ facie* case of negligence on the part of that carrier is established which casts the onus upon it, in order to escape liability of shewing that the consignment was in a damaged condition when received from the connecting carrier.

2. CARRIERS (§ III D 4—421)—UNREASONABLE DELAY IN DELIVERING GOODS BY CONNECTING CARRIER—PRESUMPTION AS TO LOSS OR DAMAGE.

Where it appears that the climate at the point of shipment precludes the frosting of a consignment of figs at the time of their delivery to an initial carrier, and that a connecting carrier had possession of them for an unreasonably long time in very cold weather without offering any acceptable explanation for the delay, a strong presumption arises that if they were damaged by frost it was while in the latter's possession.

3. CONTRACTS (§ IV B—331)—CONSIGNEE REFUSING TO ACCEPT DELIVERY—GOODS FROZEN THROUGH NEGLIGENCE OF CARRIER.

A consignee is justified in refusing to accept a consignment of figs, which, through the negligence of the carrier, were frozen in transit.

4. EVIDENCE (§ II H 1—237)—DAMAGE THROUGH NEGLIGENCE OF CARRIER—PAYMENT OF PART—EFFECT OF AS TO OTHER DAMAGE.

The payment by a common carrier of damages for injuries to a portion of a consignment of goods is not an admission of liability in respect to other portions thereof. (*Per* Irving, J.A.)

[*Hennell* v. *Davies*, [1893] 1 Q.B. 367, followed.]

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APPEAL by plaintiff from judgment of Wilson, Co.C.J., dismissing action.

The appeal was allowed.

E. P. Davis, K.C., for appellant.
A. H. MacNeill, K.C., for respondents.

MACDONALD, C.J.A.:—I do not find it necessary to decide the legal question which was raised in argument, nor to say whether or not Sutherland, who was the proprietor of the Oceanic Transit Company, the initial carrier, was the agent of defendants. I prefer to rest my judgment entirely upon the fact, which is to my mind clearly established, that on arrival of the figs at Fernie, they were then in a frozen condition. It was not a case of having been frosted, but the frost was actually in them at that time. They were received by the defendants, the Great Northern Railway Company, at St. Paul, on December 24, 1909, and were kept in transit to Fernie from that date until January 19, 1910. The defendants gave no explanation of what seems to me an unnecessarily long delay. In January the weather was very cold at Fernie. These figs were in the possession of the defendants for almost a month. The defendants offer no evidence at all as to the care taken to protect them against frost. In these circumstances I have no difficulty in drawing the inference of fact that the figs were frozen while in the possession of the defendants. I say the defendants, because no distinction was made in argument between these two companies which are operated, as I understand it, as one concern.

I would dismiss the appeal, and as it was conceded that if the defendants were liable at all they were liable for the full amount claimed, judgment should be entered below for that amount, with costs there and here.

IRVING, J.A.:—The bill of lading had across its face "Goods to be protected against frost." One of the conditions provided that any damage to goods for which the carrier is liable must be claimed against the company in whose actual custody the same may be at the time of the accident. The acceptance of these goods by the defendants at St. Paul was in effect a contract by the defendants to carry the goods on the terms stated in the original bill of lading.

It seems to me that the plaintiffs established a *primâ facie* case against the defendants when they proved that the goods

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were frozen when delivered at Fernie on January 19, and that the defendants had the custody of them from December 21 to January 19.

It became the duty of the defendants to shew that the goods were damaged when they took them over.

The letter of January 28, 1911, in my opinion ought to be regarded as written without prejudice: see *Pirie* v. *Wyld*, 11 O.R. 422.

Hennell v. *Davies*, [1893] 1 Q.B. 367, is against the plaintiffs' contention that the defendants by paying for the chestnuts admitted their liability in respect of the figs.

I would allow the appeal.

GALLIHER, J.A.:—I think this appeal should be allowed.

I am not sure that Mr. Davis' contention that the payment of the $160 for the chestnuts under the circumstances of this case is an admission of the cause of action as to the balance of the claim, is not well founded, but as I think the appeal should be allowed on another ground I refrain from deciding that point.

The goods in question, which were shipped from Naples, Italy, were receipted for in good condition.

As the only damage to the goods complained of is by frost, the evidence as to the climate of Italy precludes the possibility of their being damaged in that way at the time of shipment.

The defendant company, the terminal carriers, received these goods at St. Paul, Minn., and receipted for same in apparent good order, with this limitation, if I may so term it, "Contents and condition of contents of packages unknown."

Under such circumstances the weight of authority in the United States Courts seems to be that when it is shewn that the goods are received by the first carrier as in good order, it will be presumed in the absence of proof to the contrary that they were in like good order when received by the (here defendant) company, and unless this be repelled by evidence (the onus of which is on the company) they will be held liable. This seems to me, if I may say so, sound common sense.

Moreover, there is this further feature to be considered in the case at bar. These goods were on the road between St. Paul, Minn., and Fernie, B.C., between the 21st day of December, 1909, and the 19th day of January, 1910, an unreasonable length of time, at a time when during the month of January the evidence is that the weather was very cold.

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The presumption is very strong that if these goods were damaged by frost it was during that interval.

I am quite satisfied (as the learned trial Judge appears to have been) that the figs were frozen, and the plaintiff was justified in refusing them.

At the trial the only evidence put in by the defendants was as to whether the figs were frozen or not.

The Ida, 32 L.T.N.S. 541, is distinguishable. There it was held that there was no proof of the condition of the cargo when received at the point of shipment, and the defendants successfully met in their evidence every contention of the plaintiffs as to damage to the cargo while in transit.

Appeal allowed.

SCHWARTZ (respondent, plaintiff) v. THE HALIFAX AND SOUTH WESTERN RAILWAY (appellant, defendant).

Nova Scotia Supreme Court, Graham, E.J., Russell and Drysdale, JJ. May 10, 1912.

1. RAILWAYS (§ II D 7—75)—LIABILITY OF RAILWAYS TO REMOVE COMBUSTIBLE MATERIAL FROM RIGHT OF WAY—R.S.N.S. 1900, CH. 91.

It is the duty of a railway, under ch. 91 of R.S.N.S., 1900, to clear from off the sides of its roadway, where it passes through woods, all combustible material, such as grass, ferns, bushes, or other material, by careful burning at a safe time, or otherwise, whenever they become combustible.

2. RAILWAYS (§ II D 7—75) — LIABILITY FOR FIRES — FIRE STARTING ON RIGHT OF WAY—BREACH OF STATUTORY DUTY—R.S.N.S. 1900, CH. 91.

Under ch. 91 of R.S.N.S. 1900, which requires a railway to clear from off the sides of its roadway, where it passes through woods, all combustible material, it is answerable for the value of property adjacent to its roadway that was destroyed by fire which was started on the roadway by sparks from engines, in an accumulation of dried grass, ferns, bushes, and turf.

[*Rainville* v. *The Grand Trunk*, 25 Ont. App. 242, affirmed, *sub nom. The Grand Trunk* v. *Rainville*, 29 Can. S.C.R. 201, specially referred to.]

MOTION on behalf of the defendant company to set aside findings of the jury and for a new trial in an action brought by plaintiff as administratrix of the estate of Frank Schwartz, deceased, to recover damages for the destruction of plaintiff's dwelling house, barn, etc., by fire alleged to have been caused by sparks from defendant's locomotive igniting an accumulation of inflammable material on defendant's right of way.

The motion was dismissed, Drysdale, J., dissenting.

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The cause was tried at Halifax before Meagher, J., with a jury.

By R.S.N.S. (1900), ch. 91, "Of the protection of woods against fires," sec. 9, it is enacted that "Where railways pass through woods the railway company shall clear from off the sides of the roadway combustible material by careful burning at a safe time or otherwise."

The jury found that a fire by which plaintiff's house, barn, etc., were destroyed, originated from sparks from defendant's engine, starting upon defendant's right of way, and that inside such right of way there was an accumulation of dried ferns, grass, etc., which were the cause of the fire and its consequent spreading, and a verdict was given against the defendant railway company for damages.

The findings upon which judgment were entered in favour of plaintiff are set out in full in the judgments of the Court.

March 21, 1912. *H. Mellish,* K.C., for appellant:—There was no negligence and no violation of the statute. The meaning of the statute is that the dry material should be burned off from time to time and there should have been a further finding on this point. There was nothing on the right of way but the natural growth of grass, bushes, etc. The expression "sides of the road" does not mean that the company must clear off the material to the fences, but only to the ends of the sleepers. The engine was equipped with a spark arrester. There is no evidence that the fire started on the right of way.

W. F. O'Connor, K.C., and *W. J. O'Hearn,* for respondent:—The ferns, grass and other material on the track were the growth of the summer before, and it was the duty of defendant to have cleared them off: *David* v. *Britannic Coal Co.,* [1909] 2 K.B. 164. Keeping clear the sides of the roadway means keeping the right of way clear: Abbott's Railway Law 408; MacMurchy & Denison's Railway Law 501; Brown & Theobald on Railways 1124. We rely on the statute and also on the common law: *Grand Trunk Rly. Co.* v. *Rainville,* 29 Can. S.C.R. 201; *Smith* v. *London & S.W. Rly. Co.,* L.R. 6 C.P. 14.

Mellish, K.C., replied.

GRAHAM, E.J.:—This is an action for damages caused by a fire set by sparks from the defendant's locomotive igniting combustible materials left upon its roadway, such as dried ferns, grass, bushes and turf. The fire in its course burned down some buildings of the plaintiff adjacent to the road.

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These are the findings of the jury:—

1. Q. How did the fire originate? A. From sparks from the defendant's engine.

2. Q. Where did it start? A. It started upon the defendant's right of way.

3. Q. Was it upon the right of way or was it outside of the railway fence, and was it by sparks carried from defendant's engine? A. Yes, it was upon defendant's right of way, inside the fence. It was on the right of way and inside the fence, and was caused by sparks carried from the defendant's engine.

4. Q. What was the condition of the right of way at that place? Answer fully and give details as to its condition? A. Inside the right of way was an accumulation of dried ferns, grass, bushes and turf.

5. Q. If there were combustible material upon the right of way at that time, what effect, if any, had its presence there in causing the spread of the fire? A. The presence of the combustible material at this place and time was the cause of the fire and its consequent spread.

6. Q. What damages were occasioned by the loss of the house? A. One thousand three hundred dollars.

7. Q. By the loss of what was in the house belonging to the deceased? A. Two hundred dollars.

8. Q. By the loss of the barn? A. Three hundred dollars.

9. Q. By the loss of the cooperage? A. One hundred dollars.

10. Q. By the loss of its contents?

11. Q. By the loss of the pig and hen house? A. Fifty dollars.

The negligence relied on is common law negligence and, second, the breach of a provision, R.S.N.S. 1900, ch. 91, "Of the protection of woods against fires."

After provisions imposing requirements on a railway company as to locomotive screens, etc., and the duties of the locomotive drivers, the statute provides, sec. 9:—

> Where railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise.

The fire took place the 23rd of May, 1911, and at this point the railway had not been cleared that spring or since the previous summer, when it had been burned over by a fire which escaped the control of the employee of the company. The gen-

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erally adopted way appears to be cutting it and then burning it on the spot.

In the summing up, which is not complained of by the defendant, the case was submitted only upon the view of there having been a breach of the statute which I have quoted. The learned Judge explained, of course, to the jury the necessity of regarding only the proximate cause.

The defendant contends that the plaintiff is not entitled to judgment upon these findings; that the statute is not absolute.

In my opinion the plaintiff could only rely upon negligence at common law, about which I say nothing, because it was not submitted to the jury, although I think that there was a case for the jury in view of *Rainville* v. *The Grand Trunk*, 25 Ont. App. 242, affirmed, *sub nom. The Grand Trunk* v. *Rainville*, 29 Can. S.C.R. 201, and other cases which are cited for a passage I shall quote presently, or upon a breach of the statutory provision which I have quoted.

And she must fail on that unless it is absolute, for there is no such word as "negligently" or its implication or any half-way measure in its terms. It is either absolute or nugatory.

Of course statutes of this character have expressions like "keep free from" or "keep clear." But I think that that is the proper meaning of this statute, because any other construction in view of the tenor of the Act would lead to an absurdity, and a construction of that character is to be avoided.

When is the company to clean from the roadway which passes through woods combustible material? I answer, whenever it is there. Not when the company first builds its road, nor when a prudent owner would clear, nor yearly, but whenever these growths of ferns, grass bushes or other material become combustible.

I do not think in practice that this is a hardship. The emission of sparks from a locomotive is, as the learned Judge indicated to the jury, practically a normal condition and unavoidable, and the Legislature may require other safeguards to protect the forests. These growths only become combustible at a certain season of the year, or perhaps at other times in a dry season, and I think it is not unreasonable for the Legislature to require its removal or for the Court to adopt the construction I have indicated.

The clearing off is permitted to be done by careful burning if it is a safe time for using fire in that way, but if it is not a safe time it is to be cleared off otherwise.

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I think that the very existence of statutes in other places where the words are to "keep the roadway clear" or "keep it free from," shews that the construction is not unreasonable.

And the common law practically requires that. Of course the question has to be submitted to a jury. It is said in 13 Am. & Eng. Enc. 466:—

"A railroad company is required to keep its track and the land of its right of way adjacent thereto free from combustible and inflammable substances which are likely to be ignited by sparks from passing engines and to communicate fire from adjacent property." (One case cited I have just mentioned.) "It is impossible to operate a railroad and prevent at all times the escape of fire from the locomotive engines. Prudence, therefore, requires railroad companies to have the property under their control reasonably clear from such material as might serve as a medium for the communication of flames. Then it has been held negligence on the part of a railroad company to permit dry grass and weeds in considerable quantities to accumulate on its right of way, rendering the company liable for starting a fire thereon which was directly communicated to plaintiff's property adjoining."

The findings meet the terms of the statute construed in the manner I have indicated.

On the other question I think that the findings are supported by the evidence. In this view the application should be dismissed. Of course if this view is incorrect the Court has power to grant a new trial to enable the plaintiff to submit to a jury the case of negligence apart from the statute.

RUSSELL, J.:—The probabilities of the case as they appear to me are that the fire originated outside of the right of way and worked inwards to and upon the right of way. If I had been a juryman I think I should have so found. But the jury has found otherwise and that the fire was caused by sparks from the engine falling upon accumulations of combustible material inside the right of way. I cannot say that this is a verdict that no reasonable jury could come to. There was evidence that the sparks blew down from the smoke stack and there was every possibility that they should ignite the rubbish at the side of the road. If the fire happened in this way I think that the company must be held liable. I incline to think that it would be negligence to leave such accumulations on their property, even if there

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were no statute. But the statute clearly, in my opinion, requires them to keep the sides of the road free from combustible material within a reasonable distance from the rails, and I should think a fair reading would require them to clean the whole right of way. I have not, however, looked at the authorities on the point. It is enough to say that if the findings of the jury can be supported by the evidence, they present a clear case of negligence, and that there is evidence from which a not unreasonable jury could find as this jury has done.

DRYSDALE, J. (dissenting):—Whether there should be a new trial I think rests solely upon the proper construction of sec. 9 of ch. 91, Revised Statutes of Nova Scotia, "Of the protection of woods against fires."

The section reads as follows: "When railways pass through woods, the railway company shall clear from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise."

At the time of the fire in question there was combustible material on the company's right of way, and the question whether it was so there by the negligence of the company was not put to the jury. I take it the verdict entered ought to stand if the section quoted creates and imposes on the company an absolute liability to keep their right of way absolutely clear of combustible material, but if the section is only intended to impose such a duty as would be satisfied by the burning over of such material at certain safe times in the year, then the company's liability would depend on negligence, and without a finding of negligent conduct in having or leaving combustible material on the right of way a verdict could not be sustained against them, considering the nature of the country through which most of the railways in this Province pass. I would not have supposed that the Legislature meant to impose the absolute duty on railway companies of clearing from the right of way all combustible material at all times and of keeping the way absolutely free from such material, and if such an onerous duty were intended I think it ought to be found in clear language in the statute.

If careful burning of such material on the right of way at such times as fires may be safely resorted to, is all that the section means, then the statute could not be considered onerous. But I take it, the whole point in the case is to construe what the Legislature meant when they said the company "shall clear

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from off the sides or the roadway the combustible material by careful burning at a safe time or otherwise." Would careful burning of the combustible material, such as moss, dry soil, shrubs, plants and bushes, at suitable times, say once or twice a year, be considered a compliance with the intention of the Legislature under this section, and I feel obliged to say that in my opinion it would. Had it been intended to impose a further obligation than this, different language would, I think, have been used, and until the Legislature sees fit to clearly impose such an onerous undertaking on the railways of the Province as the absolute duty of at all times keeping the sides of the roadway through the woods and barren stretches of this Province absolutely clear of combustible material, I am of opinion the position of the railways ought to be considered on the basis of negligence only in respect to the condition of their ways.

Holding this view, and finding that the question of negligence of the company in respect to the condition of its right of way was not submitted to or passed upon by the jury, I think there ought to be a new trial herein.

Motion dismissed.

COOPER v. LONDON STREET R. CO.

Ontario Divisional Court, Boyd, C., Teetzel, and Kelly, JJ. May 15, 1912.

1. STREET RAIWAYS (§ III B—26)—DUTY OF RAILWAY COMPANY—USUAL STOPPING PLACE—NEGLIGENTLY RUNNING PAST STATIONARY CAR.

A passenger who had just alighted from a street car which was followed by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom and habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track where she was struck by a car which was negligently run past the stationary car.

[*Wright* v. *Grand Trunk R. Co.*, 12 O.L.R. 114, specially referred to.]

2. TRIAL (§ II C 8—137)—SUBMISSION OF QUESTIONS TO A JURY—LACK OF CARE IN RUNNING CAR—CAR STATIONARY DISCHARGING PASSENGERS.

The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel

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track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track.

[*Brill* v. *Toronto R. Co.*, 13 O.W.R. 114, distinguished.]

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injuries sustained by being struck by a car of the defendants, after she had alighted from another car, and was attempting to cross the track.

The appeal was dismissed.

I. F. Hellmuth, K.C., for the defendants.

Sir George Gibbons, K.C., for the plaintiff.

The judgment of the Court was delivered by BOYD, C.:—I think this case could not properly have been withdrawn from the jury, and I am not prepared to dissent from the conclusion reached by the jury and favourably viewed and acted upon by the Chief Justice. The situation of the plaintiff at the rear of the car from which she had got out, with a car approaching her on the same track, coupled with the warning given by one on the car she had left to look out for the car, may well have flurried and perturbed her, as the witnesses say, and have led her, in the face of a strong wind, to lower her head and hurry across the track to her place of destination, not observing the coming upon her on the track she was crossing of the other car which was passing the stationary car. Upon this state of facts, the jury may have rightly absolved from contributory negligence: see *Wright* v. *Grand Trunk R. Co.*, 12 O.L.R. 114.

On the question of negligence by the company there was also evidence which ought not to have been withdrawn from the jury. The reception of this evidence by an expert from Hamilton was not objected to, and the effect of it was to indicate that sufficient caution was not observed in approaching this place of crossing the street, at which the car carrying the plaintiff stopped regularly for the discharge and reception of passengers. There was proved to be a habit or custom of those leaving the cars to cross the tracks at that point to get to Albert street, and this practice was well known to the company. If the view was obscured by the station-

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ary car to the conductor of the oncoming car, that was a strong reason for slackening the speed and exercising conformable caution in the view of probable danger at that crossing. And the jury have found negligence in running the south-bound car at too high a rate of speed, when the north-bound car was standing and passengers getting off.

Brill v. *Toronto R. Co.*, 13 O.W.R. 114, is distinguishable from this, in that a duty was cast on the car approaching the place of crossing taken by the passengers for Albert street to go slow while the passengers were being discharged.

I would affirm the judgment with costs.

Appeal dismissed.

EDMONTON STREET R. CO. v. GRAND TRUNK PACIFIC R. CO.

(File 19435.)

Board of Railway Commissioners. May 27, 1912.

1. RAILWAYS (§ II B—17*a*)—CROSSING OF STEAM RAILWAY BY MUNICIPALLY OWNED STREET RAILWAY—STREET SENIOR OF RAILWAY—LIABILITY FOR COST OF INSTALLATION, ETC.

Where, in point of time, a city street is senior to the tracks of a steam railway that cross it, the tracks of a municipally owned street railway which are subsequently laid across the tracks of the steam railway, are not junior thereto so as to require the whole cost of the installation, maintenance and protection of the crossing to be borne by the city, but it will be divided equally between them.

2. RAILWAYS (§ II B—17*a*)—NECESSITY OF A MUNICIPALLY OWNED STREET RAILWAY SUBMITTING APPLICATION TO CROSS TRACKS OF STEAM RAILWAY TO LIEUTENANT-GOVERNOR IN COUNCIL—RAILWAY ACT (DOM.), SEC. 227.

An application of a street railway to cross the tracks of a steam railway company at a place where the latter crosses a city street, need not be submitted to the Lieutenant-Governor-in-Council for approval, under sec. 122 of ch. 8, of the Alberta Statutes of 1907, as to steam railways under federal control, since such application falls within sec. 227 of the Railway Act, R.S.C. (1906), ch. 37.

APPLICATION of the Edmonton Street Railway to cross the tracks of the Grand Trunk Pacific at Twenty-first street, city of Edmonton.

MR. COMMISSIONER MCLEAN:—The Grand Trunk Pacific in consenting to this crossing submits:—

(*a*) That in terms of the agreement entered into between the city and the railway on March 6th, 1906, under which the railway was allowed to lay its tracks on the street in question,

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the Edmonton Street Railway is junior at the point of crossing and should, therefore, bear the whole cost of installation, maintenance, and protection of the crossing.

(*b*) That under section 122 of chapter 8 of the statutes of Alberta, 1907, an application must first be submitted to the Lieutenant-Governor-in-Council for approval of the crossing before application is made to the Board.

The first of these contentions had already been dealt with in the case decided on March 26th, 1909, in which the Board held that in the matter of the city carrying its municipally owned and operated street railway along or across its own street, the street being senior to the tracks of the steam railway located at the point of crossing, under such conditions the ordinary principle of seniority did not apply. The city has a right to carry its traffic along its streets by such means as it deems fit. The street being senior at the point involved in the present application, it cannot be claimed that the municipally owned street railway, which is one of the city's instrumentalities of carriage, is junior to the steam railway. Regarding the second point raised by the railway, it is not necessary to consider the pertinency of the provisions of the legislation referred to. What is before the Board is an application which falls squarely within section 227 of the Railway Act, R.S.C. (1906), ch. 37.*

Order should therefore go for the crossing; the cost of construction, maintenance of the crossing, as well as installation and

*Section 227, ch. 37, Revised Statutes of Can. (1906), is as follows:—

The railway lines or tracks of any company shall not cross or join or be crossed or joined by or with any railway lines or tracks other than those of such company, whether otherwise within the legislative authority of the Parliament of Canada or not, until leave therefor has been obtained from the Board as hereinafter provided.

2. Upon any application for such leave the applicant shall submit to the Board a plan and profile of such crossing or junction, and such other plans, drawings and specifications as the Board may, in any case, or by regulation, require.

3. The Board may, by order—

(*a*) grant such application on such terms as to protection and safety as it deems expedient;

(*b*) change the plan and profile, drawings and specifications so submitted, and fix the place and mode of crossing or junction;

(*c*) direct that one line or track or one set of lines or tracks be carried over or under another line or tracks or set of lines or tracks;

(*d*) direct that such works, structures, equipment, appliances and materials be constructed, provided, installed, maintained, used or operated, watchmen, or other persons employed, and measures taken, as under the circumstances appear to the Board best adapted to remove and prevent all danger of accident, injury or damage;

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maintenance of the protection to be divided between the city and the Grand Trunk Pacific. The protection to be installed to be as recommended in the following extract from the report of the Board's chief engineer:—

> I am of the opinion that the crossing should be allowed, provided a half interlocker is installed with semaphores 500 feet distant from the diamond on the line of the steam railway and split point derails 100 feet from the diamond on each side on the lines of the electric railway. The normal condition of semaphores to be left clear for the steam railway and derails to be open for the street railway, which must come to a full stop, the conductor going ahead to the diamond, putting up the semaphore against the steam railway and closing the derails for the electric railway. After the car passes the derails, this operation is to be reversed and the electric car can proceed. The speed of the steam railway not to exceed 15 miles per hour at this point.

THE ASSISTANT CHIEF COMMISSIONER concurred.

NOTE.

On August 30, 1912, the Board gave leave to the Grand Trunk Pacific R. Co. to appeal to the Supreme Court of Canada on the following two questions of law:—

(1) Was the Board bound by the agreement between the City of Edmonton and the Grand Trunk Pacific Railway Company? and

(2) If it was so bound, do the provisions of section 7 of the agreement mean that the railway company should not pay such expense as is placed upon it by the Board's order?

If the railway company thinks the city is not complying with the provincial laws, the Courts of the Province are open to it.

(*e*) determine the amount of damage and compensation, if any, to be paid for any property or land taken or injuriously affected by reason of the construction of such works;

(*f*) give directions as to supervision of the construction of the works; and,

(*g*) require that detail plans, drawings and specifications of any works, structures, equipment or appliances required, shall, before construction or installation, be submitted to and approved by the Board.

4. No trains shall be operated on the lines or tracks of the applicant over, upon, or through such crossing or junction until the Board grants an order authorizing such operation.

5. The Board shall not grant such last-mentioned order until satisfied that its orders and directions have been carried out, and that the provisions of this section have been complied with: 6 Edw. VII. ch. 42, sec. 15.

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CUNNINGHAM v. MICHIGAN CENTRAL R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.

1. RAILWAYS (§ II D 2—36)—LIABILITY—BRAKEMAN OF ANOTHER RAILWAY —TRACING CARS.

A brakeman who was employed by a railway company other than the defendant, cannot recover for injuries sustained by being struck by a train where, without the knowledge or leave of the defendant, he was in its yard looking for cars that might be delivered to his master in due course, so as to, for his own convenience, expedite their disposal, when received, since no breach of any duty owed him by the defendant was the cause of his injury.

2. EVIDENCE (§ II E 5—163)—PRESUMPTION—ESTABLISHING KNOWLEDGE— ACQUIESCENCE OF RAILWAY COMPANY.

Permission of a railway company to a brakeman of another company to enter its yards to look for cars that might be delivered his master in due course, so as to, for his own convenience, facilitate their disposal when received, cannot be inferred from the testimony of the plaintiff that he had done so for several months in the night-time, or from the testimony of a servant of the defendant that he had "seen them come out different times," since it was not sufficient to shew knowledge on the part of the defendant of the plaintiff's conduct, much less to establish acquiescence therein sufficient to amount to leave or right to do so.

3. RAILWAYS (§ II D 2—36)—EMPLOYEE OF ANOTHER RAILWAY IN DEFENDANT'S YARD—DUTY TO TRESPASSER—SPEED OF TRAIN IN RAILWAY YARD.

A brakeman of a railway company other than the defendant cannot recover for injuries sustained while, for purposes of his own, he was in the defendants' yard, by being struck by a train that gave all statutory warnings of its approach, where the plaintiff stated immediately after the accident that he saw the train coming but supposed that it was on a track different from that near which he was standing and where no peculiar circumstances are shewn to require a lessening of speed in the yard below that permitted by statute.

APPEAL by the defendants from the judgment of Teetzel, J., upon the findings of a jury, in favour of the plaintiff, a brakesman employed by the Toronto Hamilton and Buffalo Railway Company, who, while engaged in checking cars for his employers, was struck by an engine in charge of the defendants' servants, and injured, in an action for damages for his injuries. The jury found negligence, and assessed the plaintiff's damages at $1,500, for which sum he was awarded judgment with costs.

D. W. Saunders, K.C., and *A. A. Ingram*, for the defendants.

D. L. McCarthy, K.C., and *J. G. Gauld*, K.C., for the plaintiff.

The judgment of the Court was delivered by

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MEREDITH, J.A.:—It seems to me to be impossible to support the judgment in this case, directed to be entered in the plaintiff's favour at the trial.

In the first place, there is no evidence of any duty to the plaintiff, on the part of the defendants, the breach of which had anything to do with his injury. He was in the place where the accident happened without the leave or knowledge of the defendants, as far as the evidence shews. The work he was engaged in was premature; he had no right to interfere with the cars in any way until they were delivered by the defendants to his masters, the other railway company. That which he was doing was being done for his own convenience, and was at best but only a cursory glance at cars which might, and probably would, be so delivered in due course—a glance which might, and no doubt would generally, aid in the convenient disposition of some of the cars after such delivery in due course. There is no evidence of any duty, or right, on the part of the other railway company to interfere, in any manner, with any cars, such as those in question, until they were duly delivered; the delivery being made by the transfer of way-bills, through the station-master, or the night operator performing his duty, and shunting the cars from the defendants' lines into the line of the other railway company. So that there seems to me to be no lawful justification for the plaintiff, or any other of the servants of the other railway company, going among the tracks of the defendants for any purpose in connection with these cars. But it was said that it had been habitually done by them, and that from such conduct it ought to be conclusively presumed that it was done with the leave of the defendants. There is, however, no such evidence sufficient, in my opinion, to support even a prima facie case of such leave. The whole evidence is that of the plaintiff, who said that he had done the same sort of thing, in the night-time, for several months; and that of a brakesman of the defendants, that he had "seen them come out different times there." Surely there is in this no reasonable evidence of any knowledge on the part of the defendants of the plaintiff's actions in this respect, not to speak of acquiescence in it amounting to even leave, much less a right. The plaintiff, then, being really a trespasser upon the defendants' property, it cannot be reasonably contended that there was a breach of any duty towards him.

Assuming, however, that the plaintiff had a right to be where he was, on what ground can it be said that the defendants were

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guilty of negligence towards him? The jury have said, in not slowing speed and giving such warning as ringing the bell or blowing the whistle of the engine of the train by which he was injured on approach to station or yard limits. It is not proved, nor is it now contended, that any "warnings" which legislation provides for were not given; the evidence is that they were given; so that that which the jury must have meant was additional warning, because the warnings required by statute and given were given on approaching the station or yard limits; it may be that they meant within the yard limits, though there is no evidence that the bell was not continuously rung. Having given all the warnings required by statute-law, and the railway being fenced, no jury has a right to be a law-maker in each particular case, and in effect overrule legislation without any peculiar circumstances requiring a reduction of speed. It ought not to be the law that each jury may in each particular case determine what ought to have been the speed of a railway train, though there are no kind of peculiar circumstances in the particular case requiring a lessening of the statute-permitted speed.

Again, the plaintiff testified that, if the bell were ringing, he could not hear it; he said, "You could not hear a bell very far coming that distance;" and two witnesses, both trainmen, and one the engineer of the train on which the plaintiff was employed, testified that, immediately after the accident, the plaintiff said that he saw the train coming, but mistook the place where he was standing, thinking there was a track between him and the west-bound line on which the oncoming train was; that is, that his own mistake, not any want of warning, caused his injury. The most that he would testify to, opposed to this, was that he had no recollection of saying it, and that, if he did, it was untrue; so that I cannot think there was any reasonable evidence that the accident was caused by the speed of, or any want of warning from, the train by which he was struck. His statement at the time is the only reasonable one of the cause of the accident, having regard to the fact that he was an experienced brakesman, with a knowledge of the yard and of the movement of trains at the time, especially of the incoming, about that time, of the fast train by which he was struck in the noise of its oncoming, after signalling its approach, and in the glare of the head-light of the engine.

I would allow the appeal and dismiss the action.

Appeal allowed and action dismissed.

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THOMPSON v. GRAND TRUNK R. CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. June 18, 1912.

1. RAILWAYS (§ II D 2—37)—LIABILITY OF RAILWAY COMPANY—DEATH OF TEAMSTER UNLOADING CARS—NON-REPAIR OF ROADWAY.

Where one is injured by the want of repair of a road in the station yard of a railway company, and the road is one which is used by the public openly and constantly as a road for teams, and there is no notice or other indication that it is not intended to be so used, the fact that the company has provided another road in good repair which might have been used, is no defence, in the absence of contributory negligence, to an action for damages for such injuries.

APPEAL by the defendants from the judgment of Teetzel, J., in favour of the plaintiff, upon the findings of a jury, in an action by Sarah Thompson to recover damages for the death of her husband, John Thompson, who was thrown from his waggon at Caledonia station and killed, owing, as alleged, to the negligence of the defendants in respect of the condition of the railway premises.

The appeal was dismissed.

D. L. McCarthy, K.C., for the defendants.

H. Arrell, for the plaintiff.

GARROW, J.A.:—The deceased was a teamster, and was employed to unload gas pipes from a car standing upon the defendants' track in their station-yard at Caledonia station. On the morning of the 17th May, 1911, he went with his team to begin the work, and while in the station-yard was thrown from his waggon and killed. The immediate cause of the jolt which threw him from the waggon was the sudden descent of one of the wheels into a rut in the roadway, which roadway, it is said by the plaintiff, was out of repair—such lack of repair being the negligence of which the plaintiff complains. The defendants deny that the roadway in question formed any part of the station-yard, and say that another and sufficient roadway along the other side of the track had been supplied and properly maintained, and was the only roadway which the deceased was entitled to use.

The roadway in question is upon the former site of a track which had for some reason been removed southerly a distance of about ten feet some two years before the accident—after which, as the undisputed evidence shews, teams began to be

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driven in and out over the ground formerly occupied by that track, a custom which continued without interruption by the defendants until the accident in question. There was some evidence that the condition of the road at the time of the accident had continued for some time prior thereto. The rut is described as two feet long and about eight inches deep.

The defendants called no witnesses. At the close of the plaintiff's case, a motion of nonsuit was made, upon the ground that no cause of action had been established, which was refused, and the case went to the jury, who, in answer to questions, found that the place on which the deceased was driving at the time of the accident was used by the public openly and constantly as a road for teams before the accident; that the defendants were guilty of negligence in allowing the rut or hole to remain as it existed at the time of the accident; that such negligence was the cause of the injury; that there was no contributory negligence; and they assessed the damages at the sum of $5,000, for which sum the plaintiff has judgment.

The case could not, I think, have been withdrawn from the jury. The material issues were upon questions of fact; and the findings are, I think, warranted by the evidence. The Dominion Railway Act, by sec. 284, imposes a duty upon railway companies to furnish adequate and suitable accommodation for the carriage, unloading, and delivery of traffic. And, although the road upon the south side was the better road, there was nothing to indicate that the other road upon the north side was not also to be used as part of the accommodation furnished. That it was being used, and used extensively and continuously, is abundantly clear from the evidence. And that it was out of repair and dangerous, to the knowledge of the station agent in charge, long before the accident, was not, on the evidence, an unreasonable inference, especially as the station agent was not called to deny it.

That it was necessary in order to reach the northerly roadway to drive over the rails which lay between the one road and the other, while of some significance, was certainly not, under the circumstances, conclusive.

The appeal, in my opinion, fails and should be dismissed with costs.

MEREDITH, J.A.:—There was evidence upon which the jury might find that the road, on the south side of the track, was apparently one intended to be used for the purpose of loading and

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unloading cars standing on the track lying between it and the road on the north side of it; also that the man who was killed was proceeding by way of the northerly road to the southerly one, there to unload the car, and was acting with ordinary care in so doing; and that the accident was caused by the negligence of the defendants in leaving a dangerous hole in the southerly road; and so a case for the jury was made; and the question of contributory negligence was also one for them on the facts of the case.

If the defendants did not intend the southerly road to be so used, they should have given notice to that effect or have stopped it up; for as it was it constituted an invitation, and one of an attractive character, saving the turning around of waggons on either side to unload there.

I would dismiss the appeal.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Appeal dismissed.

Re VANCOUVER, VICTORIA & EASTERN R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. June 28, 1912.

1. ARBITRATION (§ III—17)—AWARD—CONCLUSIVENESS—SETTING ASIDE FOR FAILURE TO CARRY OUT UNDERTAKING—R.S.C. 1906, CH. 37, SEC. 198.

An award made by arbitrators appointed under sec. 196 of the Railway Act, R.S.C. 1906, ch. 37, to ascertain the compensation that should be paid for injuries to land not actually taken or used by the railway, the owners claiming that the land was injuriously affected because the railway was built between the land and the sea, thereby cutting off their rights of access to the sea, will be set aside because of the failure of the arbitrators to keep a promise made by them to the owners of the land when the suggestion was offered on the arbitration proceedings that the question of the applicability of sec. 198 of the Railway Act, R.S.C. 1906, ch. 37, to such a case should be referred to the court, which promise was that they, the arbitrators, should have it appear on the face of the award whether or not such section applied.

[Judgment rendered at the trial affirmed by divided court.]

THIS is an appeal from an order of Gregory, J., setting aside an award under the Railway Act.

The appeal was dismissed, the Court being equally divided.

A. H. MacNeill, K.C., for appellant.

Messrs. *D. Armour, J. R. Grant* and *A. W. V. Innes*, for respondents.

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MACDONALD, C.J.A.:—During the course of the proceedings before the arbitrators a question was raised as to whether or not sec. 198 of the Railway Act could be applied to the facts of this case. No land had been taken from the owners claiming compensation. The railway did not touch their land, but they claimed that their lands were injuriously affected because of the construction of the railway between these lands and the sea. During such discussion it was suggested that the question of the applicability of said section be referred to the Court. This suggestion was not acted upon because the arbitrators promised the land owners that they would make it appear on the face of the award whether or not they had applied the section. This promise was not kept. There is no suggestion of bad faith on the part of the arbitrators, but the result was that the land owners refrained from taking advantage of their right, and relied upon an equivalent, namely, to move if necessary after the award was made, which they could do if it appeared on the face of the award that the arbitrators had applied the section. Evidence was offered to shew that the arbitrators did apply the section. It was objected to on the ground that arbitrators are not permitted to give evidence as to what took place amongst themselves. In my view of the case it is not necessary to decide this question. The evidence shewing the promise is that of one of the solicitors in the proceedings before the arbitrators, and the award itself shews that that promise was not carried out. It does not, therefore, seem to me essential to shew either that the arbitrators did or did not apply the said section. They may have done so, and that, in my opinion, is sufficient to invalidate the award, if, in fact, the section is inapplicable.

In terms the section deals only with "lands through or over which the railway will pass." The increased value is that created "by reason of the passage of the railway through or over the same, or by reason of the construction of the railway." These two disjunctive clauses refer to lands through or over which the railway will pass. Farther along in the section reference is again made to the lands with which the section deals. The arbitrators are to set off the increased value against the loss or damage that may be suffered or sustained by reason of the company "taking possession of or using said lands."

To arrive, therefore, at the conclusion that sec. 198 applies, it is necessary to delete from the section the words "through or

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over which the railway will pass," and to disregard the plain and ordinary meaning of the words "taking possession of or using the said lands."

As against what I conceive to be the plain and grammatical construction and meaning of the clause, it is urged that the word "such" in the phrase "such value or compensation" at the beginning of the section, refers to the antecedent sections relating to arbitration, and properly includes both classes of claims, namely, those where land is taken and those where land is not taken or entered upon. This contention is correct, but I think the word "such" must be confined in its meaning by the rest of the section. It was also contended that it is not reasonable to suppose that Parliament intended to make one rule for one class of claims and another for another class when there is no apparent reason for doing so. While that is a circumstance not to be overlooked, it does not appear to me to outweigh the obstacles in the way of the construction which the appellants contend for.

It was also strongly pressed upon us in argument that the railway actually entered upon and took possession of "land" of the respondents within the definition of land in the interpretation clause of the Act; that the respondents' rights to access to the sea are hereditaments within the meaning of that definition, and that when the appellants built their line along the foreshore in front of respondents' property they in effect took an interest in land by destroying that which was an incident to the enjoyment of the land. The respondents' right to access to the sea may be an hereditament; if so, it is an incorporeal one. The railway company is given by the Act the right to enter in and upon the lands of other persons, and looking at the whole purpose and context of the Act, I am of opinion that assuming the right in question to be an hereditament, the definition of land above referred to must be confined to corporeal hereditaments. I think the language of Lord Watson in *Great Western Railway Co.* v. *Swindon & Cheltenham Railway Co.* (1884), 9 A.C. 787, at p. 800, is applicable to this case. He says, speaking of the English Lands Clauses Act, which contains a definition of land practically identical with that in the Railway Act:—

> Now, it is perfectly true that the word "lands" as it occurs in many of the leading clauses of the Act of 1845, is, by reason of the context, limited to corporeal hereditaments. Taking that Act *per se*,

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and irrespective of the terms of any other statute, these clauses do not appear to be applicable to the compulsory taking of an easement, at least in the sense in which the respondents are by their Act empowered to purchase and take such a right. The only easements which these provisions, read by themselves, seem to contemplate, are servitude rights burdening the corporeal lands taken by the company, which are destroyed or impaired by the construction of the railway. The company are not dealt with as being either entitled or bound to purchase and take such easements, but as liable to make compensation in respect of their having by the construction of their authorized works injuriously affected the dominant land to which the easements are attached.

The appeal should be dismissed.

IRVING, J.A.:—Gregory, J., set aside the award on the application of the owners.

Sec. 198 requires the arbitrators to ascertain what amount should be allowed to the owner for inconvenience, loss or damage suffered or sustained by reason of the railway company taking possession of or using his land.

Although I am of opinion that sec. 198 does not apply to this case, yet I do not see why the arbitrators should not in ascertaining the compensation payable to the landowner in respect of the incorporeal hereditament adopt for their guidance the principles indicated by sec. 198. Incorporeal hereditaments are deemed to be in the possession of him who is entitled to them.

In this case the railway do not take possession or use any of the land the property of the respondents. How then can anything be set off against something which cannot be ascertained?

Sec. 198, therefore, in my opinion, cannot apply to this case.

That being so, can this award be set aside? Mr. Gordon contended that as the arbitrators had taken sec. 198 into consideration, they were guilty of that technical misconduct which is included in sec. 11 of the Arbitration Act—misconduct only in the sense that they made a mistake as to the scope of the authority conferred on them. There is no doubt that an award will be set aside if an arbitrator has gone wrong in point of law, and the error in law appears upon the face of the award. This was decided many years ago: *Hodgkinson* v. *Fernie* (1857), 3 C.B.N.S. 189, and was acted upon by this Court in *Humphreys* v. *Victoria*, 5 D.L.R. 294, 21 W.L.R. 555.

The principle is this: Courts are unwilling to interfere with the decision of those whom the parties have selected to be the

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judge of the law and the fact; so, for a mistake in law, the award will not be ground for setting it aside, unless it appear on the face of the award: see cases collected in Redman on Awards, 1903 ed., p. 276.

As pointed out by Parke, B., in *Phillips* v. *Evans*, 12 M. & W. 309:—

> Although we may possibly do some injustice in particular cases, I think it is better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every case.

It has always been the inclination of the Courts to uphold rather than set aside awards: *Re Templeman*, 9 Dowl. 962; *Cock* v. *Gent*, 13 M. & W. 364; 15 L.J. Ex. 33; *Re Falkingham*, [1900] A.C. 452; *Adams* v. *Great Northern*, [1891] A.C. 39; *Howenzollern*, 54 L.T. 596. *Hodgkinson* v. *Fernie*, 3 C.B.N.S. 189, is instructive on other points raised in this case. It lays down the rule that there is no difference whether the award is by a professional man or a layman, and it also deals with the question as to an award being sent back for a mistake in law not apparent on the face of the award, but disclosed in a separate writing; and the case of *Jones* v. *Corry*, 5 Bing. N.C. 187, was mentioned as an authority to send the case back on the strength of a letter written by the arbitrator after the award had been made. In 1861, *Holgate* v. *Killick*, 31 L.J. Ex. 7, 7 H. & N. 417, the Court refused to look at a letter written by a Master to whom the case had been referred.

In 1875 *Dinn* v. *Blake* was decided, L.R. 10 C.P. 388; the application to remit was based upon a verbal statement made by the arbitrator as to the grounds on which he had decided. The application was refused because it was not shewn that the arbitrator had admitted that he had decided erroneously, following *Lockwood* v. *Smith*, 10 W.R. 628. There was nothing to indicate to the Court that the selected tribunal was desirous of the assistance of the Court: *per* Archibald, J., at 391, and willing to review his decision on the point on which he believed himself to have gone wrong: *per* Brett, J., at 390; Denman, J., expressed the same opinion. In the interval the opinion had been given by Mr. Baron Cleasby in advising the House of Lords in *Duke of Buccleugh* v. *Metropolitan Board of Works*, that in an application to set aside an award on the ground of mistake or misconception of the arbitrator, the Court would probably reject no means of informing itself whether the arbitrator had

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proceeded upon such a mistake or misconception: L.R. 5 H.L. (1872), at 436.

The rule is summed up by Strong, J., in *McRae* v. *Lemay*, 18 Can. S.C.R. 280, that to interfere on the ground of mistake in law (1) the mistake must appear on the face of the award, or in some paper which forms part of the award, and is by reference incorporated with it; (2) where the arbitrator has himself shewn that he is not satisfied with the award and is desirous of the assistance of the Court on the point on which he believes he has gone wrong.

Having reached this conclusion, we may now read what the arbitrators have said or written.

The letters written by His Honour Judge Lampman cannot be regarded as an official act: see sec. 197 (2) so as to amount to an expression of opinion by, or a request on behalf of the majority that the Court should lend its assistance and advice to the Board. The landowners therefore have not satisfied the onus which is cast on them, that there should be an expression from a majority of the Board of a willingness to reconsider the matter. Judge Lampman's letter amounts to nothing more than this: "We may have been wrong, and therefore you are in a position to carry it further"; but it is to be noted that although requested, in terms, to do so, he does not request nor consent to the application being made.

Then there remains the point put before us by Mr. Armour, that the counsel for the landowners were misled by a remark made at the hearing by the presiding member of the Board, and that as a consequence the landowners have been deprived of their right of appeal. It has been truly said that the surest way to have a misunderstanding is to have an understanding. The usual and proper way to take the opinion of the Court as to scope of a submission to arbitration when you are dissatisfied with the course being taken at the hearing, is to apply to revoke the submission or to ask for a special case: *Hart* v. *Dyke*, 32 L.J.Q.B. 55. In this case no request was made to the Board for a stated case, nor was there any application to revoke.

It is true that certain evidence was objected to (p. 60), but the record does not shew that the objection was pressed or that any agreement was made between counsel, or between the Board and counsel. In fact, as already mentioned, there was no request for, and therefore no refusal of, a stated case. The counsel for the landowners chose to rely on what the presiding member said

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was his intention, but it seems the presiding member was not able to carry out this intention.

I do not see that the other members of the Board were bound by the presiding member's declaration of intention, as the submission was to two. The promise of the presiding member, if promise is the proper word, must be understood as being subject to the speaker's ability to get another to agree with him. I do not think either of the other two members of the Board was called upon to express approval or dissent from the proposed course, nor was counsel or the railway bound to object. An obligation to speak by no means arises from a mere challenge.

I would allow the appeal.

MARTIN, J.A.:—While I have reached the same conclusion as the learned Chief Justice, I am far from being free from doubt about the true construction of this difficult section, 198, and think it desirable to add that in my opinion the definition of "lands" is sufficient to cover the right of access in question, which is a "natural right" and a species of easement: Goddard on Easement, 3; 11 Hals. 238; and clearly an incorporeal hereditament according to the authorities: *e.g., Great Western R. Co.* v. *Swindon R. Co.* (1882-3), 52 L.J. Ch. 306, 53 L.J. Ch. 1075; *The Queen* v. *Cambrian R. Co.* (1871), L.R. 6 Q.B. 422, 9 A.C. 787; *Lyon* v. *Fishmongers Co.*, 1 A.C. 662; *North Shore R. Co.* v. *Pion* (1889), 14 A.C. 612, which also shew that there is no difference in principle between the rights of access of riparian owners on tidal waters or navigable and non-navigable streams. But it would appear from the judgment of Lord Watson, in the *Great Western* v. *Swindon* case, 52 L.J.Ch. 306, 53 L.J.Ch. 1075, that unless the corresponding English Land Clauses Act

> is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion,

it does not apply to hereditaments of that nature, and in view of the fact that this opinion of Lord Watson has been applied by the Court of Appeal in *Re The City and South London R. and the United Parishes of St. Mary, etc.*, [1903] A.C. 728, I think it is a safe guide to follow in this case in construing the effect that is to be given to the crucial words in sec. 198, viz: "any lands of the opposite party through or over which the railway will pass." Though the expression in our interpreta-

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tion, sub-sec. 15 of sec. 2, is at first blush somewhat broader than the corresponding interpretation of "lands" in sec. 2 of the English Land Clauses of 1845 (8 and 9 Vict. ch. 18) because it says that land "includes real property messuages lands, tenements and hereditaments of any tenure," whereas the English Act omits "real property," yet that really does not carry the matter any further, because although in the broad conveyancing sense all property must be either real or personal, yet the decision of the Queen's Bench Division in *Laws* v. *Eltringham* (1881), 8 Q.B.D. 283, shews that, where the sense of the matter and the context require it, the wide term "any real or personal property whatsoever" will be applied to tangible property only, and not to incorporeal rights.

I therefore agree that the appeal should not be allowed.

GALLIHER, J.A.:—This is an appeal from the judgment of Gregory, J., setting aside an award dated December 9th, 1911, made by His Honour Peter S. Lampman, and Howard J. Duncan, two of the arbitrators appointed to act in an arbitration respecting above lots, between the Vancouver, Victoria and Eastern Railway and Navigation Company and J. J. Banfield and Evans B. Deane.

The award simply fixes the damage sustained at one dollar per lot, and is valid on its face.

The parties attacking the award contend that it was agreed between the arbitrators and all parties concerned during the arbitration proceedings, that the arbitrators should in their award set out the amount which they considered the lots in question were damaged by the construction of the railway, and also the amount to which they considered such lots were benefited.

Had this been done, the claimants would have been in a position to apply to the Court to set aside the award on the ground that the arbitrators proceeded upon a wrong principle provided sec. 198 did not apply, which was the claimants' contention.

There is nothing on the face of the award which shews whether or not the arbitrators dealt with sec. 198, but in correspondence which took place subsequent to the award being made between the chairman, Judge Lampman, and the solicitors for the claimants, it appears that the two arbitrators who made the award considered that sec. 198 did apply, and the only reason why they did not shew on the face of the award the amount of damages and the increased value, was because no two of them

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could agree as to the damage to any particular lot, but two of them did agree that the damage was fully compensated by the increase in value and awarded the nominal sum of one dollar in respect of each parcel.

Objection was taken that this correspondence is not admissible, and I agree that it is not admissible in so far as it may be sought to shew matters included in or excluded from the award by the arbitrators: *Duke of Buccleugh* v. *Metropolitan Board of Works* (1872), 5 E. & I., appeals at 436.

But we have in the arbitration proceedings the opinion expressed by the chairman, Judge Lampman, and Mr. Duncan, another of the arbitrators, that sec. 198 did apply, and evidence was taken of increased valuation subject to objection by the claimants. In looking at the award itself, and having in view the evidence, I think we must reasonably assume that in making their award the arbitrators did apply sec. 198.

It then becomes necessary to inquire as to whether the agreement as contended for was entered into, and if so, have the respondents been prejudiced in the non-fulfilment of same?

I think we must assume from all the evidence before us (and in this respect I consider the correspondence admissible) that the agreement was entered into, or the promise given, as it is styled.

When the question of the applicability of sec. 198 came up, the plain and proper course for the respondents to have taken was to have asked for a reference under the Arbitration Act, and is the one which I think counsel should have pursued, but on the other hand, had the arrangement been carried out as promised, they would have had their remedy as I have above pointed out.

We have then to consider whether the failure to carry out the arrangement amounted to legal misconduct, and if so, have the respondents been prejudiced?

Under the authorities, a request made to refer and a consent given but not acted upon by the arbitrators, and an award made without such reference, has been held to be legal misconduct and the award set aside.

I can see no distinction between such a case and the one under consideration, but as Courts of law should favour the upholding of awards unless some manifest injustice would be done, we should, I think, consider whether the respondents have been prejudiced by reason of the failure of the arbitrators to carry out their agreement.

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Admittedly if sec. 198 applies they could not be prejudiced, as under the course the respondents chose to pursue, had the arbitrators carried out their promise, the only ground open would be that sec. 198 did not apply, and therefore the arbitrators had proceeded upon a wrong principle.

Section 198 is as follows:—

> The arbitrators or the sole arbitrator in deciding on such value or compensation shall take into consideration the increased value beyond the increased value common to all lands in the locality that will be given to any lands of the opposite party through or over which the railway will pass by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands.

The short point in regard to this section is, does it apply where the company constructing the railway does not use or take possession of any of the lands of the applicants?

The respondents' contention is that because the company do not use or take possession of any of the lands of the applicants, no set-off under this section can be applied, although they may claim damages in respect of such lands for injurious affection by reason of the construction of the railway.

Under the section, the arbitrators having decided that by reason of the construction of the railway an increased value beyond that common to all lands in the locality has been given to the lands in question, shall take into consideration such increased value. "Shall take into consideration" clearly implies for some purpose, and the respondents say that purpose is qualified by the latter words of the section, "and shall set off such increased value," etc., to the end.

I think we should endeavour to get at what was the intention of Parliament in framing this section. The first part of the section directs that the arbitrators shall take into consideration, etc., not only increased value by reason of the passage of the railway through or over the lands, but by reason of the construction of the railway as well—this latter is wide enough to include lands not touched by the railway, and since the arbitrators are directed to consider increased value in respect of such, direction in this respect would be useless if it can only be applied to lands actually entered upon.

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There are no words in the section directly forbidding such application, and it should not be presumed that Parliament legislates uselessly. It seems to me that Parliament could not have intended (that in a case where compensation for damage is sought in respect of lands not taken but injuriously affected by the construction of a railway), after directing that increased values to the lands by reason of such construction should be considered that such increased values could not be set off. If necessary I would read in at the end of the section the words "or by reason of the construction of the railway."

I think that sec. 198 is applicable, and if I am right the respondents are in no way injured by the failure of the arbitrators to carry out the agreement.

The judgment of Gregory, J., should be reversed, and the award restored.

Appeal dismissed by divided Court.

KERLEY v. LONDON AND LAKE ERIE TRANSPORTATION CO.

Ontario High Court. Trial before Boyd, C. June 25, 1912.

1. CONSTITUTIONAL LAW (§ II A 5—249)—RAILWAY COMPANY INCORPORATED UNDER DOMINION PARLIAMENT—PROVINCIAL LEGISLATION REGULATING WORK ON SUNDAY—RIGHT OF PARLIAMENT TO PASS—R.S.C. 1906, CH. 37, SEC. 9.

Section 9 of the Railway Act, R.S.C. 1906, ch. 37, enacting that every railway situated wholly within one province of Canada and declared by Parliament to be either wholly or in part a work for the general advantage of Canada, shall be subject to any Act of the Legislature of the province in which it is situated prohibiting or regulating work on Sunday, is *intra vires* of the Parliament of Canada.

2. CONSTITUTIONAL LAW (§ II A 5—249)—RAILWAYS—OPERATION ON SUNDAY—WHAT AMOUNTS TO A CONTINUOUS ROUTE—R.S.C. 1906, CH. 37, SEC. 9, SUB-SEC. 5.

In order that a railway or part of a railway may form part of a continuous route or system within the meaning of sub-sec. 5 of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, respecting operations on Sunday, there must be a direct physical connection between it and the other through road of which it is to form a part, and proper facilities by way of sidings and accommodations for the transfer of traffic must exist, which should generally be sanctioned by the proper authorities.

[*Hammans* v. *Great Western R. Co.*, 4 Ry. & Canal Traffic Cas. 181; *Great Central R. Co.* v. *Lancashire & Yorkshire R. Co.*, 13 Ry. & Canal Traffic Cas. 266; *Black* v. *Delaware & Raritan Canal Co.*, 22 N.J. Eq. 402, referred to.]

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3. STATUTES (§ II A—96)—CONSTRUCTION OF PROVINCIAL ENACTMENT—LEGISLATIVE INTENT—POWER OF COURTS TO QUESTION THE REASONABLENESS OF THE ENACTMENT.

In considering the constitutionality of any enactment of a Provincial Legislature, every intendment will be made to support it, and it is not the business of the courts to pass upon its wisdom or reasonableness, but simply to say whether it is fairly within the area of the constitutional powers of the Legislature.

4. RAILWAYS (§ II D 1—31)—OPERATION—SUNDAY LAWS—BINDING EFFECT OF PROVINCIAL ACT ON STREET RAILWAY COMPANY INCORPORATED BY DOMINION PARLIAMENT—6 EDW. VII. (ONT.) CH. 30, SEC. 193.

Section 193 of the Ontario Railway Act 1906, 6 Edw. VII. ch. 30, respecting operation on Sunday is, by virtue of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, binding upon an electric railway situate wholly within the Province of Ontario, which was incorporated by the Parliament of Canada in 1910, and declared to be a work for the general advantage of Canada.

ACTION to recover $1,200 penalties from the defendants for running their cars on three Sundays, contrary to the provisions of the Ontario Railway Act, 1906.

Judgment was given to the plaintiff for the penalties claimed.

J. A. Paterson, K.C., for the plaintiff.

M. K. Cowan, K.C., and *J. B. Holden*, for the defendants.

June 25, 1912. BOYD, C.:—The simple question here is, whether the defendants are liable to pay penalties for running their cars on Sunday. The answer is far from simple, and involves difficulties in the application of constitutional law not covered by previous authority. It appears necessary to take a somewhat general survey of the whole field of pertinent legislation, Imperial, Canadian, and Provincial.

But first as to the legal status of the defendants, a body incorporated on the 17th March, 1910. On the ground, the line of track of the defendants extends over an area of some sixteen miles, from London to Port Stanley, on Lake Erie. Power is given by the charter to establish a line of lake steamers and so communicate with the State of Ohio at Cleveland. Power is also given to construct various ramifications all near-by the present line and all within the Province of Ontario. The railway is at present nothing more than an electric road within the Province. Its possibly larger operation in the future over other Provinces or over the Great Lakes is a matter of contingency that does not affect the present situation. Nevertheless, by reason of presenting, in its application for incorporation, this extended character as in contemplation, it became a subject for incorporation by Dominion charter, and so was passed the statute 9 & 10

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Edw. VII. ch. 120, wherein the undertaking was declared to be a work for the general advantage of Canada, and the company was empowered to hold, maintain, and operate the railway subject to the provisions of the Railway Act of Canada (R.S.C. 1906, ch. 37). That statute does not, nor does the private Act, prohibit the running of cars on Sunday. The running in this case took place on the 11th, 18th, and 25th days of December, 1910. It is proved that on one of these days His Majesty's mail was carried, by special request, from London to Port Dover, in addition to the usual carriage of passengers and their belongings.

There has been a long-standing attempt in this Province to enforce cessation of labour on local railways during Sunday, and many efforts have been made to place the law in this respect upon a plain and intelligible footing. This is a most desirable result in regard to all penal or criminal laws, which should be made simple and clear for all men. What has been attempted and decided will now be related as briefly as possible.

In March, 1897, it was decided by the Court of Appeal that a company incorporated for the purpose of operating street cars by electricity was not an inhibited "person," within the meaning of the provisions of the Lord's Day Act then in force, R.S.O. 1887, ch. 203: *Attorney-General* v. *Hamilton Street R.W. Co.* (1897), 24 A.R. 170.

The Legislature forthwith proceeded to remedy this by passing a new "Act to prevent the Profanation of the Lord's Day" (R.S.O. 1897, ch. 246). This was of larger scope than the one of 1887 passed upon by the Court, and by secs. 7 and 8 expressly provides for the prohibition of Sunday excursions by railway, and forbids generally (with exceptions not now relevant) the operating of electric street railway cars on the Lord's Day.

In 1901, a broader legal question was raised as to the power of the Provincial Legislature to enact ch. 246. The whole Act was brought before the Court of Appeal for Ontario upon questions submitted by the Lieutenant-Governor in Council. The first question was as to the validity of the whole Act, and in particular as to secs. 1, 7, and 8, and it was answered by a majority of the Court, and the answer affirmed the validity of the statute. Two subsidiary questions were also submitted: (1) as to the power of the Province to prohibit Sunday work on railways subject to the exclusive legislative authority of the Dominion; and (2) as to the like powers in the case of railways declared to be for the general advantage of Canada. These latter questions were

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answered negativing such power in the Province: *Re Lord's Day Act of Ontario* (1902), 1 O.W.R. 312. An appeal was then taken to the Privy Council, and that tribunal reversed the opinion of the majority of the Judges below on the first question, and it was decided that the Act as a whole was *ultra vires*, for substantially the same reasons as those given by Armour, C.J.O., the dissentient Judge. Their Lordships held that the Act, "treated as a whole," was one dealing with a subject falling under the classification of "criminal law," which, by the distribution of powers in the British North America Act, 1867, sec. 91, sub-sec. 27, was reserved for the exclusive legislative authority of the Parliament of Canada: *Attorney-General for Ontario* v. *Hamilton Street R.W. Co.*, [1903] A.C. 524. Their Lordships held that this answer to the first question rendered it unnecessary to answer the second (as above set forth), thus in effect, as I understand, affirming the view expressed by all the Ontario Judges in appeal, that the clauses as to the operation of the Dominion railways were not within the competence of the Provincial Legislature.

Other remaining questions (not now, it would seem, relevant to this litigation) the Lords of the Privy Council declined to entertain, as being of hypothetical character which should be left for decision in concrete cases as and when they might arise.

The next attempt to resolve the broad question was by the Dominion, upon a special case referred by the Governor-General in Council to the Supreme Court of Canada in February, 1905: *In the Matter of the Jurisdiction of a Province to Legislate respecting Abstention from Labour on Sunday* (1905), 35 Can. S.C.R. 581. This case set forth a draft Act embodying legislation contemplated by the Province of Ontario in 1904, and in particular asked for direction as to its competence to prohibit the operation of railways on the Lord's Day in the case of undertakings incorporated by the Province and those incorporated by the Dominion, and also as to those incorporated by the Dominion which were declared to be for the general advantage of Canada, but authorised to operate within one Province only (to wit, Ontario), and whose operations were confined to such Province. The majority of the Judges (as it were under protest and without prejudice) indicated their opinion to be that all such interferences making for the compulsory observance of the Lord's Day were beyond the proper competence of the Province and fell within the views expressed by the Privy Council in 1903 as being of criminal character and so within the ambit of the Dominion Parliament.

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Pending the launching and the decision of this special case, the Dominion had been legislating, and we find the Canada Railway Act, 1903, being amended by the statute of 4 Edw. VII. ch. 32 (passed on the 10th August, 1904), in which first appear the important clauses upon the force and effect of which the present litigation is mainly to be determined. One provision relates to every railway (electric and other) wholly situate within one Province of Canada, but in its entirety or in part declared to be a work for the general advantage of Canada, and enacts that it shall, notwithstanding such declaration, be subject to any Act of the Legislature of the Province in which it is situated, prohibiting or regulating work, etc., upon the first day of the week—which is in force at the time of passing the Act (sec. 2, adding sec. 6*a* to the Act of 1903). And by sub-sec. 2 it is enacted that "the Governor in Council may at any time and from time to time by proclamation confirm, for the purposes of this section, any Act of the Legislature of any Province passed after the passing of this Act" (*i.e.*, 10th August, 1904), "for the prohibition or regulation of work, business or labour upon the first day of the week, commonly called Sunday; and from and after the date of any such proclamation the Act thereby confirmed, in so far as it is in other respects within the powers of the Legislature, shall for the purposes of this section be confirmed and ratified and made as valid and effectual as if it had been enacted by the Parliament of Canada; and, notwithstanding anything in this Act" (*i.e.*, the Railway Act) "or in any other Act, every railway, steam or electric street railway, and tramway, wholly situate within such Province, but declared by the Parliament of Canada to be, in its entirety or in part, a work for the general advantage of Canada . . . shall thereafter, notwithstanding such declaration, be subject to the Act so confirmed, in so far as that Act is otherwise *intra vires* of the Legislature."

This first appears as an amendment to the Railway Act, and is carried into the revision of 1906, where it now stands as sec. 9, with some few immaterial verbal variations: R.S.C. 1906, ch. 37, "An Act respecting Railways."

This large committal of powers to the Provincial Legislature in respect of local railways was subject to some exceptions: the section was not to "apply to any railway or part of a railway,—(*a*) which forms part of a continuous route or system operated between two or more Provinces, or between any Province and a foreign country, so as to interfere with or affect through traffic thereon;—or, (*b*) between any of the ports on the Great Lakes and such

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continuing route or system, so as to interfere with or effect through traffic thereon;—or, (c) which the Governor in Council by proclamation declares to be exempt from the provisions of the section" (sec. 9, sub-sec. 5).

In the year 1906, being that of the last revision of the Dominion statutes, the Province passed "The Ontario Railway Act, 1906," 6 Edw. VII. ch. 30, assented to on the 14th May, in which provisions are to be found respecting and under the heading of "Sunday Cars." Section 193 (1) declares that no company operating a street railway, tramway, or electric railway, shall operate the same or employ any person thereon on the first day of the week, commonly called Sunday, except for the purpose of keeping the track clear of snow or ice, or for the purpose of doing other work of necessity. With certain exceptions (not now relevant) the section is to apply to all railways operated by electricity, whether on a highway or a right of way owned by the company (sub-sec. 6).

The proclamation of the Governor-General in Council confirming sec. 193 of the Ontario Railway Act (just set forth) was duly promulgated on the 8th December, 1906.

The defendant company came into existence on the 17th March, 1910, by Dominion Act 9 & 10 Edw. VII. ch. 120, under this condition of prior legislation (Federal and Provincial). Nothing has been done, as I have said, by the company, in the way of lake navigation in connection with their line.

No proof was given of any such facts as would indicate that this local road forms part of a continuous route or system carrying through traffic, within the meaning of these words as used in railway legislation. The cases shew that there must be a direct physical connection between the local road and the other through road of which it is to form part, and that proper facilities by way of sidings and accommodations for the transfer of traffic must exist, and these generally should be sanctioned by the proper authorities (in this case the Board of Railway Commissioners) before the particular road can form part of a "continuous route or system:" *Hammans* v. *Great Western R.W. Co.* (1883), 4 Ry. & Canal Traffic Cas. 181, and *Great Central R.W.Co.* v. *Lancashire and Yorkshire R.W. Co.* (1908), 13 Ry. & Canal Traffic Cas. 266. To the same effect is American Railway law: *Black* v. *Delaware and Raritan Canal Co.* (1871), 22 N.J. Eq. 130, 402.

I find as facts that the road has always been strictly a local concern, with no such connection as would constitute it part of "a continuous route or system," and that the traffic of the company was in no sense "through traffic," within the meaning of

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the Dominion Railway Act, R.S.C. 1906, ch. 37, sec. 9. So that the road, as operated at the time of the alleged offences, was not within any of the exceptions expressed in such section of the Dominion Railway Act. Wherefore, the net result is, that the defendant company, though it be an undertaking which has been declared to be for the public benefit of Canada, is yet, by virtue of the Canada Railway Act and the proclamation of December, 1906, subject to sec. 193 of the Ontario Railway Act, which prohibits the operation of electric railway cars on the first day of the week, commonly called Sunday.

The way is now cleared to consider the constitutional aspect of the controversy.

The Parliament of Canada, by the agency of the Governor-General in Council, undertakes to confirm any Act of the Ontario Legislature within the legislative authority of the Province, in so far as the Act prohibits or regulates work, business, or labour upon the first day of the week on any electric railway wholly situate within the Province and which has been declared by the Parliament of Canada to be a work for the general advantage of Canada.

In the present case, the Parliament of Canada has, through the agency of the executive proclamation, ratified and confirmed sec. 193 of the Ontario Railway Act, and made it as valid and effectual as if it had been enacted by the Parliament of Canada: R.S.C. 1906, ch. 37, sec. 9 (3). So far as express language can effect anything, this defendant company has been made subject to the said section 193, in so far as it has been so confirmed (*ib.*, sub-sec. 4).

All that remains, as I regard the case, is to consider whether what has been done by this conjoint legislation is within the scope and power of the respective Legislatures under the Imperial Constitutional Act so as to justify this Court in exacting the penalties claimed.

The defendants' road is territorially within the Province, and is, as operated, strictly a local work respecting which Ontario might properly legislate. But authority to legislate in respect of this road by the Province has been superseded by the intervention of the Dominion, because of its being regarded as a work for the general advantage of Canada: see B.N.A. Act, sec. 92 (10). The Constitutional Act there confers exclusive legislative authority as to this road on the Dominion (sec. 91 (29)). But the Dominion is invested with authority to make laws for the peace,

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order, and good government of Canada in all matters not assigned exclusively to the Provinces: and this means, I take it, the exercise of large and liberal discretionary powers to be exercised for the well being of the community and for the right working of the constitution: sec. 91 and *Riel* v. *The Queen* (1885), 10 App. Cas. 675, at p. 678, *per* Lord Halsbury.

The authority of the Dominion extends to such works as, though wholly situate within the Province, are, before or after their execution, declared to be for the general advantage of Canada. Here the declaration was made before the execution and in anticipation of what was to be done. Suppose no steps to be taken as to the navigation of the lake by the company or in establishing part of a continuous route or system, it would be competent for the Dominion to nullify the declaration and to subject the company to provincial legislation. I see no good reason why the Dominion should not suspend the affect of this declaration, either directly or indirectly, for sufficient cause, so as to restore (as it were) the power of legislation to the Province in regard to the particular company. Legislative authority exists in the Province as to all local works and undertakings, though it may be superseded by the paramount power of the Dominion in suitable cases. But the Dominion may still utilise the Province as one of the agencies of government, by inviting it to intervene with legislation considered desirable, and not contrary to any controlling enactments passed by the Dominion Parliament. This may be regarded as supplementary legislation of which the Dominion is willing to avail itself or of which the Dominion is willing that the Province should avail itself. The consideration in these cases is not grounded on the doctrine of *ultra vires*, but rather as to what is permissible reciprocally to a superior and a subordinate Legislature in regard to subjects on which each has some right to make laws. The case in hand illustrates this position. We have to deal with two law-making bodies acting with plenary and exclusive powers within the ambit of subjects distributed to them by the Constitutional Act, and yet with some class of rights in which the exercise of power by one may infringe on the exercise of power by the other. The Court is not to deal with a legislative enactment as with a by-law. The Legislature or Parliament is not called on to shew cause or give reasons why a certain law has been passed. The policy of the Dominion dealing with long lines of railway through the Provinces and to foreign lands is against any breaking of carriage for any period of time, and insists on a continuous transit, and Parliament, therefore, places no restriction

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on the running of railways on every day in the week. The policy of Ontario appears to be in favour of a restricted use of the railways subject to provincial control on the first day of the week. If one assumes that, after the many attempts to get judicial guidance to assist in formulating valid and efficient laws on the subject of Lord's Day observance, the law-makers came to the conclusion that no satisfactory statute could be framed on this head which would answer the demands and the requirements of the various Provinces of the Dominion: *e.g.*, that what would satisfy a new western community might not harmonise with the views of the oldest centres of population—that what might satisfy Quebec would not satisfy Manitoba—and so on; this conclusion of inability might serve to explain why we have the present complexity of legislation, bringing into exercise apparently the ingenuity of the legal profession and the reserved resources of the constitution to find out some suitable and effective outcome. One is not to assume that legislation is futile; rather to seek to give effect to it, if possible.

The Parliament on this point as to railways means to leave it to each Province to determine what shall be done with Sunday, or rather what shall be done on Sunday. What I have sought to express has been considered also, I find, by Mr. Justice Barker in *Ex p. Green* (1900), 35 N.B.R. 137, at p. 147. He says: "I am disposed to think that the Dominion Parliament, in designedly refraining from legislating on this subject, did so because it was one which did not concern the general public or affect them all to the same extent or apply to them all in the same degree; but was rather to be regarded and dealt with as a police regulation, local in its character and in its application, which required to be moulded so as to suit the requirements and meet the conditions of different localities and different classes of population, and in that way ensure a reasonable cessation from labour and worldly business on Sunday." See *The Queen* v. *Halifax Electric Tramway Co.* (1898), 30 N.S.R. 469.

Apart from the religious observance of the day, which cannot be enforced by law, the legislators must have recognised the value of a recurring period of rest in railway life, more than ever needed in modern stress and competition. The political value of a rest-day is put thus by Macaulay: "During this cessation of labour a process is going on quite as important to the wealth of the nation as any process which is performed on more busy days. Man, the machine of machines, is repairing and winding up so that he returns to his labour on Monday with clearer intellect, with livelier

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spirits, with renewed corporeal vigour." However the day of rest may be used or abused, the legislators may well consider the policy a wholesome one in so far as corporations are concerned over which they have creative and regulative power.

It seems to me possible as well as proper so to fit together these enactments as to induce harmonious and efficient action between the two Governments, Federal and Provincial, in order to the attainment of an end which both have had in view. One may wonder why the Sunday labour question was not dealt with directly and immediately by the Parliament of Canada. But, whatever the reason be, it is for the Court to explain and as far as possible to render effective the joint legislation (suggestive on the one hand and responsive on the other), so that by co-operation the desired end may be reached of securing one day of periodical rest.

The scheme of this twofold legislation is not to be regarded as a delegation of legislative power in a matter of criminal law to a body having no capacity to legislate criminally, but rather the designation by the Dominion of a legislative agency to decide whether it is expedient to enact a law for the regulation of the Lord's Day in its secular aspect, as to railways entirely within the Province, and a legislative report being made by an appropriate enactment, then to give full legal force and efficacy to such provincial action by accepting it and assuming responsibility for it as if it were a Dominion statute. The statute of the Province indicates the policy acceptable to the Province, and the Dominion says "be it so." In this regard, the legislative power of the Province is no longer overridden by the Dominion, but is recognised as a power properly exercised. It appears to me that the Dominion may relax its hold on any internal provincial railway and lay it open in a defined degree to be regulated or controlled by the local Legislature.

As I read the opinion given upon the special case in 35 S.C.R., the Court intimates that a Province has no power to restrict the operation of companies of their own creation to six days in each week because that restriction seems to be within the views expressed in the Privy Council and to be regarded as a matter of criminal law, *ultra vires* of the Province. See pp. 582 and 592, in answer to question 5.

This point, in this limited way, as to purely provincial corporations, was not before the Lords of the Privy Council, and their guarded deliverance would rather imply that this was one of the questions not passed upon. However, with all proper deference

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to the Judges of the Supreme Court, I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law. I fail to see why the Province may not legally and validly incorporate a railway company in Ontario as a local undertaking with power to operate only on six days of the week. A refusal to allow work on the Sunday would not in this connection savour of the criminal law, but would be a supposed or an accepted salutary rule of conduct imposed for the benefit of the workmen and the better working of the road itself. If the company accept such a charter with such a limitation, wherein is the Constitutional Act offended against? The legislative working of the whole constitution in these cases of apparent conflict or discrepancy is to be accommodated or adjusted by the expedient worked out in the *Hodge* case and others in the same direction: *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Fielding* v. *Thomas*, [1896] A.C. 600, 611; *Grand Trunk R.W. Co.* v. *Attorney-General of Canada*, [1907] A.C. 65, 68. The aspect of the law takes colour from its surroundings, *i.e.*, the nature of the legislation and the object aimed at. Here is no general criminal intent, but the incorporation of a local concern, over which the Province has plenary power of legislation, covering all things and conditions considered expedient and desirable by the incorporating power.

After the disposal of the special case in the Supreme Court, the Province of Ontario passed their railway law, which by its enactments imposes this limitation upon electric railways, 6 Edw. VII. ch. 30, sec. 193, and that has not been questioned as being *ultra vires*. The power to legislate as to the Lord's Day by the provincial law-makers, as to railways subject to their legislative authority, is recognised in the Dominion Lord's Day Act, R.S.C. 1906, ch. 153, sec. 3 (2).

Briefly to sum up the results. It is not to be overlooked that the defendants in this case take the Dominion charter subject to the state of existing legislation. It is taken, therefore, with knowledge that the Dominion had permitted the Province to legislate as to Sunday work on local railways (despite the declaration as to the undertaking being for the public advantage of Canada), and that the Province had legislated to the effect that for six days only should the road be worked for profit, and that the executive of the Dominion, under sanction of the Parliament of the Dominion, had approved and confirmed this provincial law. How then can the defendants defend this action on the ground that the charter was not taken on this footing? Can the company

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be allowed thus to "approbate and reprobate"? Can the privileges of the charter be enjoyed and the conditions be repudiated?

I may add a few words as to laws having more than one aspect, Marshall, C.J., said in *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 204, that "all experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

Besides the constitutional cases already referred to, the point has arisen in the consideration of municipal and other by-laws.

In *Calder and Hebble Navigation Co.* v. *Pilling* (1845), 14 M. & W. 76, a by-law that a canal was not to be used on Sundays was held invalid because not warranted by the general power of a local statute to make by-laws for the good government of the company and for the good and orderly using of the navigation and the work—governing of the bargemen, etc. The by-law was held to be one relating to matters which ought to be left to the general laws of the land as to the observance of Sunday. Rolfe, B., said that under peculiar circumstances the by-law might be upheld; as if, for instance, the company were to come to the conclusion that, in order to secure a due supply of water in the canal, it was necessary to have no navigation on it during one day out of seven in order to make navigation good during the other six, and then Sunday might be taken as the fittest day to close the canal: p. 90. In other words, though the by-law would be bad if made for merely moral purposes, *pro salute animarum*, it might be upheld if susceptible of another construction, and if regarded in a different aspect, bringing it within the competence of the corporation or law-making body.

Another illustration of this double aspect in a by-law, as to whether it deals with the morals of the community rather than with the good rule and government of the locality, may be found in *Thomas* v. *Sutters*, [1900] 1 Ch. 10, 15. In that case *Calder and Hebble Navigation Co.* v. *Pilling*, 14 M. & W. 76, is discussed, and it is pointed out that, while a navigation company may have no legal concern about the behaviour or morals of those who use it, the power of a municipality dealing with the good order of their streets goes far beyond that: pp. 16, 17. So there is a further advance in power and responsibility when the field of action is laid open to a legislative body such as one of the Provinces of the Dominion. In this last case every intendment will be made to support the legislation, and it is not the business of the Courts to pass upon the

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wisdom or reasonableness of the enactment, but simply to say whether it is fairly within the area of its constitutional powers.

By the legislation of the Dominion it has been left to the Province to say whether any condition shall be imposed upon local electric railways in regard to the working of the road on Sundays. And the response made by the Province is, that it is fitting that there should be one day of rest in seven, and that Sunday is the fittest day for that purpose. Good reasons may easily be found for such a policy, having regard to Sunday as a secular institution; public economy requires for sanitary reasons a periodical day of rest from labour, and this salutary rule may rightly and legally be imposed upon corporations which owe their existence to the provincial power which so legislates and creates. This is not, therefore, a general law extending to the public at large—to all classes and conditions of men—but to a corporate body over which the local Legislature has, inherently or by delegation from the Dominion, legislative plenary power as to its conduct, governance, and operation.

The late decision of the Supreme Court on Sunday law in *Ouimet* v. *Bazin* (1912), 3 D.L.R. 593, is not in point for the present case. It is distinguishable both because it purports to be a general law framed for all persons, and because the case did not involve the question of local corporations over which the Province has constitutional power and competence.

The legislation is not to be regarded as a section of the criminal law of Canada, but as a particular penal law intended for the regulation of local electric railways within the Province.

So viewed, I would uphold the impeached legislation as *intra vires*, and would award to the plaintiff the penalties claimed.

There should be no exemption as to the day on which the mail was carried. The cars were not run for the purpose of carrying the mail, but the mail was carried as a favour because the cars ran that Sunday.

Costs to the plaintiff.

Judgment for plaintiff.

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HERRON v. TORONTO R. CO.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Riddell, JJ. September 12, 1912.

1. NEW TRIAL (§ III B—15)—INCONSISTENT AND UNCERTAIN FINDINGS OF JURY—PERSONAL INJURY—NEGLIGENCE.

In a personal injury action arising from a car colliding with a rig, where the jury finds (*a*) that by reasonable care plaintiff, had he seen that he had sufficient time to cross the tracks, could have avoided the accident, (*b*) that by reasonable care defendant's motorman had he applied the brakes when he first noticed plaintiff heading across the tracks could have avoided the accident, (*c*) that the accident was caused by negligence of *both* plaintiff and defendant, such findings are inconsistent and uncertain and a ground for a new trial.

2. NEW TRIAL (§ III B—15)—VAGUE AND AMBIGUOUS FINDINGS—JURY PERPLEXED—PERSONAL INJURY—NEGLIGENCE.

In a personal injury case arising from a street car colliding with a rig, where the jury upon their first return into Court found under one question that after defendants' motorman saw that the plaintiff was about to drive across the tracks the motorman could *not* by reasonable care have avoided the accident, while finding under another question that the motorman was guilty of negligence in waiting too late before applying the brakes, and while finding under a third question that the motorman was negligent in not applying the brakes when he first noticed the plaintiff heading across the tracks, and where, upon proper comment by the trial Judge on such contradictory findings, the perplexed jury struck out the answers to the two questions first mentioned still leaving doubt as to what they meant by the answer to the third question, such findings are vague and ambiguous and a ground for a new trial.

3. STREET RAILWAYS (§ III C—42)—COLLISION WITH VEHICLE—ULTIMATE NEGLIGENCE.

In a personal injury case arising from a street car colliding with a rig, where the trial Judge submits the question of ultimate negligence, but the jury did not deal with it (or there is doubt as to whether they did deal with it), even in a case where, upon unravelling confused jury findings, the effect may be that both were to blame and that the motorman after he saw the plaintiff in danger could not have stopped the car, but there is no finding by the jury as to whether the motorman could by reasonable diligence have avoided the accident *after* he should have known that the plaintiff was about to cross in front of the car, and where the finding at most is that the motorman could not have stopped the car after he *saw* (not might have seen) the plaintiff, such findings are incomplete and ground for a new trial to the plaintiff if there was evidence before the jury sufficient to support a finding, had there been one, of ultimate negligence on the part of the defendant.

4. NEW TRIAL (§ III B—15)—JURY FINDINGS—PERPLEXED JURY—UNCERTAINTY.

Where the result of jury findings and of what takes place at the trial with reference to their answers and to questions put by trial Judge (both written and oral) leaves uncertainty as to what they meant, a new trial will be granted.

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APPEAL by the plaintiff from the judgment of MEREDITH, C.J. C.P., after trial with a jury, dismissing the action with costs.

The action was to recover damages for personal injuries sustained by the plaintiff, by reason of a car of the defendants striking the wheel of a buggy in which he was driving, whereby he was thrown out and hurt.

The appeal was allowed, and a new trial ordered, RIDDELL, J., dissenting.

Alexander MacGregor, for the plaintiff.
D. L. McCarthy, K.C., for the defendants.

CLUTE, J.:—The accident occurred at the junction of Margueretta and Dundas streets, by a collision between a west bound car and the plaintiff's rig, whereby the plaintiff was thrown to the ground and received the injuries complained of.

The plaintiff had driven down to a bicycle shop on the south side of Dundas street, and had left his horse facing west. On coming out of the shop he picked up the weight which held the horse, put it into the buggy and waited until a car went east. He then got into the buggy, when he saw another east bound car and waited until that car went by. He says that he looked both ways before crossing over and did not see any west bound car. He judged that the east bound car was about 30 feet away from the buggy when he started to cross. It does not appear that he looked to the east again before crossing, and he says that he never "knew anything" until he heard the crash.

He further states that there was also another west bound car passed, and that the first west bound car and the first east bound car crossed "just back of the buggy." That is, as I understand the evidence, there were two east bound cars and two west bound cars, and he was struck by the second west bound car.

Many witnesses were called on both sides, and as pointed out by the trial Judge, there is not only a conflict of evidence, but a great difference of opinion among the witnesses for the plaintiff, and also differences of opinion between the witnesses for the defendants.

The case was very carefully presented to the jury and questions submitted. These questions and answers, as they were first brought in, and what took place subsequently are reported as follows:—

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"His Lordship reads the jury's answers to the questions as follows:—

"Q. 1. Was the motorman guilty of negligence? A. Yes.

"Q. 2. If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

"Q. 3. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. Yes.

"Q. 4. If he could, in what respect was he negligent? A. In not seeing he had sufficent time to cross to the north side of the tracks in safety.

"Q. 5. Was the accident caused (*a*) by the negligence of the motorman? (*b*) or by the negligence of the plaintiff? (*c*) or by the negligence of both? A. Both.

"Q. 6. Could the motorman, after he saw the plaintiff was about to drive across the tracks, by the exercise of reasonable care have avoided the accident? A. No.

"Q. 7. If he could, of what negligence was he guilty? A. In waiting until too late before applying the brakes.

"Q. 8. At what sum do you assess the plaintiff's damages? A. $800."

The learned Chief Justice was not satisfied with the answers, and the following is the official report of what then took place:—

"His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

"Mr. Dewart (counsel for the defendants): I submit not.

"His Lordship: Plainly so. You find they are both guilty of negligence, and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

"Foreman of Jury: He was too near to the man in the rig to stop to avoid the accident.

"His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or they are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

"Foreman: According to the evidence, he had not a chance to do anything but what he did.

"His Lordship: Then you should have answered this 7th question—you should not have answered the way you did—

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'He was negligent in not applying the brakes'—because that means that, after he became aware that the plaintiff was in danger, he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

"Foreman: We mean the contrary—that he could not have done it in the time.

"His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

"Foreman: We said he could not have avoided the accident when he noticed it.

"His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

"The jury then retired and after some time return again to the court-room.

They had struck out the answers to questions 6 and 7 altogether, but it was not noticed that they had struck out the answer to question 6. The report continues:—

"His Lordship: The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car. That is the effect of it?

"The Foreman: Yes.

"His Lordship: Mr. MacGregor, I must endorse the record dismissing this action. The jury have been rather friendly to the railway company. I cannot help it.

"Mr. MacGregor (counsel for the plaintiff) asks for a stay.

"His Lordship: I had not observed that the jury had struck out the 'No' in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could not, by the exercise of reasonable care, have prevented the accident. They said that was their view. I will give you a stay."

It will be seen that the jury found that the motorman was guilty of negligence in not applying the brakes when he first noticed the plaintiff heading across the tracks; that the plaintiff, by the exercise of reasonable care, could have avoided the

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accident; and that he was negligent in not seeing that he had sufficient time to cross to the north side of the track in safety, meaning, as I take it, that he should have seen that he had not sufficient time to cross to the north in safety, and should not, therefore, have attempted it. They further say that the accident was caused by the negligence of both.

When they first returned to Court they answered the 6th question ("Could the motorman after he saw the plaintiff was about to drive across the track, by the exercise of reasonable care have avoided the accident?") "No." To the 7th, "if he could, of what negligence was he guilty?" they answered: "In waiting until too late before applying the brakes." The 6th and 7th questions being contradictory they retired, and on their return they had struck out the answers to both the 6th and 7th questions. The trial Judge not observing at the moment that the answer to No. 6 was struck out, said: "What you say in effect is that both these people were to blame, and that the motorman, after he saw the plaintiff was in danger, could not have stopped the car," to which the foreman answered, "Yes." And his Lordship said: "I must endorse the record dismissing this action." His Lordship then said. "I had not observed that the jury had struck out the 'No' in answer to question 6, but I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was, could not, by the exercise of reasonable care have avoided the accident. They said that was their view."

On the argument the notes did not contain the word "not" in the two places above indicated, but this has since been corrected by the reporter with the approval of the trial Judge.

The question of ultimate negligence was clearly submitted to the jury; but, as the answers now stand, the jury have not dealt with that question, unless it be that their answer to the second question was intended to deal with the question of ultimate negligence.

As the trial Judge points out

> in the pleadings there is no statement as to the specific acts of negligence which the plaintiff charges the defendants' servants to have been guilty of; but as I would gather from the course of the trial and from the observations of the learned counsel for the plaintiff, the case is put upon the ground that there was a duty resting upon the motorman of the car, which he was propelling, the east bound car, somewhere about Margueretta street, to sound the gong for the purpose of warn-

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ing people who were about to cross, warning people who were in the lawful exercise of their rights, travelling on foot or in vehicles; that the motorman did not do that; that in consequence of that the plaintiff was lulled into a feeling of security, had a right to expect that no car was approaching from the east, and that he might have safely crossed the track.

Upon that question so submitted the jury did not find against the defendants. That, of course, would have been original negligence had the jury so found. His Lordship then proceeds:

Then another ground is that when the motorman saw, as it seemed to me he admitted he saw, the plaintiff's horse on the track in the act of crossing he did not sound the gong then to warn the man.

That also would be original negligence, and on this the jury have made no finding against the defendants.

The third ground is that, even if the plaintiff was, as the defendants contend he was, guilty of negligence in the way he attempted to cross the track, the motorman saw him, or ought to have seen him in sufficient time to enable him, if he had used the appliances which he had at his command as he ought to have used them, to have stopped the car and to have avoided the collision.

This is a charge of ultimate negligence, and it has not reference to the ringing of the gong which covered the first two points, but has reference exclusively to what the motorman ought to have done after the plaintiff had been guilty of his act of negligence in attempting to cross the track.

Having regard then to the manner in which these several questions were put and the answer to No. 2, it appears to me that that has reference to this third ground—to the ultimate negligence: If that be so, the effect of this answer would give the plaintiff the right to recover notwithstanding the negligence of the defendants.

By the answer to question 5, however, both plaintiff and defendants were guilty of negligence. If the answer to question 2 was not intended by the jury to refer to ultimate negligence, then the jury have not dealt with that question, the answers to 6 and 7 having both been struck out on the second occasion when they retired, unless they sufficiently answered that questions on their return.

The jury, during the course of conversation, said clearly enough that the motorman could not have avoided the accident when he noticed it; that is, I take it, when he saw the plaintiff.

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But, on their second return, when the answers to questions 6 and 7 had been struck out, only this was said: "The only change is in taking out the answer to 7. What you say in effect is, that both these people were to blame; that the motorman, after he saw that the plaintiff was in danger, could not have stopped his car." It does not say that the motorman could not, had he exercised reasonable diligence, have avoided the accident after it appeared quite clear that the plaintiff was about to cross in front of the car, but it only says that he could not have stopped the car after *he saw* (not might have seen) the plaintiff. Of course, if there is no evidence that ought to have been submitted to the jury that the motorman, by the exercise of reasonable diligence, ought to have seen the plaintiff's rig in time to stop the car, then the judgment should stand; but, if it appears that there is evidence which would support such finding—that is, of ultimate negligence—then that question has not been answered, and the case ought to go back for trial. It, therefore, remains to examine the evidence upon this point. It is apparent from the judgment that the trial Judge took the view that there was evidence which could properly be submitted on the question of ultimate negligence; and, in my opinion, after a careful reading of the evidence, he was right in this view. I shall not quote all the evidence bearing upon this question, but sufficient as I think to shew that there was ample evidence to support a finding, had there been one, on the question of ultimate negligence; and, as pointed out by the learned Chief Justice, the strongest evidence supporting this view was given by some of the witnesses for the defendants. A fair summary may be found in the charge.

James Caines, with his wife, was waiting for a car at the north-east corner of Dundas and Margueretta streets. He says Herron was just about turning to come up Margueretta street.

> His horse seemed to be about the south rail of the track, as far as I could judge.
>
> Q. Which track? A. South track.
>
> Q. When he was there, where was this east-bound car? A. It was east of us about a couple of car lengths. That is, the car was east of the east side of Margueretta street about two car-lengths when the plaintiff turned his horse up Margueretta street.
>
> Q. What occurred next? A. Well, I saw Mr. Herron and he seemed to be straightening up to come up Margueretta street. To us he seemed to be coming across the track all right, but if the car had been going anyway reasonable Mr. Herron had lots of time to cross the track coming up Margueretta street, but before he had time

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the car struck him and he was upset. This witness is positive that the gong did not ring.

Q. Where was the car when it struck Mr. Herron as regards Margueretta and Dundas streets? A. It was west of Margueretta, on the west side of the street; very close to the west side of the street.

Q. Would you give us as clear an idea as you can of where the car was when it stopped? A. Well, when that car stopped the east end of that west bound car was about in line with the fence line of the west side of Margueretta street.

Q. Were the brakes applied? A. The brakes were not applied before they struck the man. The car was going at speed when it struck the man, and it brought him about half a car length before it came to a stop.

On cross-examination he says:—

A. I saw him on the opposite side of the street just turning to come up Margueretta street. His horse's head was about the south rail of the south track.

Q. Was the horse's head east or west of the body of the rig? A. His horse seemed to be turned up Margueretta street.

Q. And at that time when you saw him in that position with his horse on the south rails and facing north towards the west side of Margueretta street, how far was the car away? A. About two car lengths.

Q. And that is the time you noticed the car? A. That is the time I noticed the car.

His wife, Caroline Caines, says:—

Q. Did it slow down before it struck him? A. No, it did not.

Buchner, who has the bicycle shop referred to, says:—

Q. Your shop is opposite the west end of Margueretta street? A. Yes.

Q. What did you first know of the matter? A. Well, it was when I heard the fender, as I suppose, drop on the rail.

Q. Where was the car, do you say, when the fender dropped on the rail? A. It was somewhere about the centre of Margueretta street, facing——

Q. On Dundas street? A. Yes.

Q. Then what occurred? A. Well, I heard—it seemed to me when the fender dropped that they used only the ordinary brake just then. Then there was another brake seemed to come on; there was a terrible rumbling, like applying the other brake.

Pearn was a passenger on the car which struck the plaintiff's rig. He says:—

A. I was standing about 8 or 10 feet from the front end of the car in the aisle facing the north.

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Q. What did you first know about the matter? A. The first I knew about it was the crash.

Q. Was there any gong rung before the crash? A. There was no gong rung.

Q. Are you sure of that? A. Positively sure.

John Foster was driving east on Dundas street, west of Margueretta street. He says:—

Where were you relatively to Margueretta street? How near was the car that struck the rig to you when you saw it strike the rig? A. I was almost by the side of it.

Q. Where was the car when it struck the rig? A. Just in the middle of Margueretta street.

Q. How far would you say the west bound car was east of Mr. Herron when he went to cross the track? A. About 75 feet.

Q. Are you sure of that? A. Yes.

Q. About where, as regards Margueretta street, did these two cars pass one another? How far east? A. About 90 feet.

On cross-examination he said:—

Q. He was in the act of crossing at the time that you say you saw the car coming west, 75 feet away? A. Yes.

Q. How far had he got with his horse at that time? A. The horse had crossed over the tracks and just as the buggy was on the track.

Q. That was when you saw the east bound car coming 75 feet away, was it? A. No, the west bound car.

Q. It was when the west bound car was 75 feet away, was that the time his horse had just got across the tracks and his buggy was on the tracks? A. Yes.

For the defence the motorman Thompson was asked:—

Q. What was the first that you saw of Mr. Herron and his rig? A. Well, I had just been after passing a car going east bound. Just east of Margueretta street. Just on Margueretta at the east. I sounded the gong approaching the car and just as the car had got clear of me I noticed Mr. Herron's horse starting to come across, and I sounded the gong again. I saw that he was not going to stop. I would not say that I sounded the gong after that, but I put my best energies towards stopping the car, and I thought that I was going to succeed till I was about to hit him. Mr. Herron never seemed to see me until I was within 4 feet of him and then he looked around at the time.

Q. How far then was he away from you in a direction east and west, at the time that you saw him first? A. Well, I was approaching Margueretta street when I saw his horse's head first. That was after the horse's head had passed.

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The next question and answer is inconsistent with this:—

Q. Give me the distance? A. I could not swear to exactly the feet; because I cannot. I suppose probably to give an estimate I would be 8 or 10 feet into Margueretta street; but I might be mistaken.

Q. How far back of that was it that you had passed the east bound car? A. Well, I would be just passing the other car then. The car would just be east of the line I would judge.

Q. And where did you say the car struck the rig? A. Somewhere about 4 feet east of the west line of Margueretta street.

Q. How far did it take you to stop this car? A. About a car-length I consider. I do not know how long a car is, about 35 feet I suppose.

Q. Have you ever stopped in shorter? A. Well, I might if I was going slow.

Q. If you had been going slower you might have stopped quicker? A. Yes.

Q. Which way was the head of the horse facing when you saw Mr. Herron first? A. He was swinging around to the north.

Q. To go up Margueretta street? A. Yes.

Q. And the head was around facing that way when you first saw the head? A. Yes.

Robert Bernstein was walking on Dundas street:—

Q. How far were you from Margueretta street when your attention was called to anything? A. We were just about at Margueretta street when we heard a gong.

Q. What else did you see? A. As soon as we heard the gong we saw the horse coming over the rails so we turned back. As soon as we turned back to look where the car was the buggy was turned over.

George Faulkner says:—

Q. What was the first thing that called your attention? A. The loud sounding of the gong.

On cross-examination he says:—

Q. When you heard the gong ring what did you do? A. I looked to see—I at once came to the conclusion that there was something wrong.

Q. And it was right then that the crash came? A. Right then; right after the gong sounded. I looked out of the window and saw the man in the buggy, and it appeared as if he was pitched up.

Everett Holden says:—

Q. Where were you at the time? A. I was sitting near the front of the car at the time on the north side of the car.

Q. What was the first that attracted your attention? A. The first that attracted my attention was the man. He was sitting in the

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buggy and the horse was facing towards the west, and after we passed the east bound car about half way down the block the gentleman simply turned right round and drove right in front of the car going west. I could not say exactly where the car was.

Q. Do you remember how many cars you passed? A. No, I could not say.

Q. How far was the west bound car from Margueretta street when this man turned? A. Well, I could not say. I should imagine about three lengths of the car, that is roughly.

Q. Then what happened as far as the car was concerned? A. The motorman rang the bell, I should imagine about twice. That was all the time he had. Then he put on the brakes and stopped the car as quickly as he could.

According to this witness, when the motorman saw or might have seen the plaintiff, his car was three car-lengths east of Margueretta street.

Q. And did you notice where the car was after it had stopped? A Well, I should think it would be about four or maybe six feet east of the west side of Margueretta street—in that neighbourhood.

Q. And where did you say the car was when the gong was rung? A. Well, it would be about 60 feet I should imagine, when he started to ring the gong. The man was driving north at the time.

Q. And you looked when you heard the gong. A. I was looking out at the front of the car at the time on the streets.

Q. And you could clearly see the man at the time 60 feet away? A. Yes.

Harold Judge was strap-holding on the front end of the car about three feet from the door.

Q. Then just tell me what you saw? A. The car would be probably two lengths from Margueretta street east of Margueretta street, when I heard the gong, and looking out I saw the buggy with Mr. Herron, I suppose, in the buggy. I did not notice anything different until I heard the crash and looking out I saw Mr. Herron on the fender.

Q. At the time you looked, and the car was two lengths east of the east side of Margueretta street, where was Mr. Herron's rig? A. He was coming across the track turning north-east.

Q. How far had he got? A. Well, he would be about between the two tracks, I would imagine.

Q. What do you mean by that? A. Between the east and west track.

Q. The devilstrip? A. Yes.

Q. Did the motorman do anything? A. He rang the bell once.

Q. In addition to the ringing of the gong, what else was done? A. I heard the motorman put the brakes on, and I was almost thrown off my feet, that was all, I heard the crash of course.

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On cross-examination, he said:—

Q. When did you first see Mr. Herron? A. Well, as I said, about two car-lengths east of Margueretta.

William J. Rashleigh was the conductor on the car in question. He says:—

Q. What was the first that attracted your attention? A. Ringing of the gong and the sudden applying of the brakes.

Q. Where was the car relatively to Margueretta street at the time you heard the gong ring? A. Just about on the east side of Margueretta street.

Q. And brakes you say put on? A. Yes.

Walter McRae, a master mechanic, swears the car in question was 40 feet in length. He says that the car could be stopped, going at the rate of 10 or 12 miles an hour, in about two car-lengths. He also says that going 8 miles an hour it could be stopped in two car-lengths.

His Lordship: Do you want this jury to understand that it could not be stopped any quicker going 8 miles an hour than it could going 12? A. Yes, it would.

Then he further says that going 12 miles an hour it could be stopped at 90 feet.

From these witnesses it appears that there is evidence by some of the witnesses that the east-bound and west-bound cars crossed each other east of Margueretta street; that, according to several of the witnesses, the plaintiff's horse and rig could be seen from two to three car lengths east of Margueretta street, when he was was in the act of crossing to the north. According to the motorman's own evidence, he actually stopped the car within about a car length, although the mechanical engineer speaks of two car lengths as necessary to stop the car going 8 miles an hour, which was about the rate at which the car in question is said to have been moving.

If the jury believed this evidence, they could well find, as they did find, that the negligence of the motorman was in not applying the brakes when he first noticed the plaintiff heading across the tracks, and this was the answer which they brought in to question 7, "In waiting until too late before applying the brakes."

The case is then reduced to this: (1) no negligence found against the defendant as to speed or not ringing the gong, which, upon the charge, were referred to as original negligence on the

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part of the defendants; (2) negligence on the part of the plaintiff in not seeing that he had time to cross the track; (3) ultimate negligence on the part of the motorman in not applying the brakes at an earlier stage when, according to the witnesses and his own evidence, he might have stopped the car notwithstanding the negligence of the plaintiff.

The evidence is very contradictory upon almost every point. Five of the witnesses for the plaintiff swear positively that the gong did not sound. A number of witnesses for the defendants swear that it did.

The jury not having found in favour of the plaintiff upon this issue, it must be taken that the gong did sound.

In one view of the findings, they may mean that when the motorman saw the plaintiff it was too late to stop the car.

The result of the jury's findings and of what took place at the trial with reference to their answers and questions put by the learned trial Judge, leaves uncertainty, in my opinion, as to what they meant.

I think there was evidence of ultimate negligence that could not be withheld from the jury, and that they could have given no clear and sufficient answers to the questions submitted to them.

There should, therefore, be a new trial. Costs of the former trial and of this appeal to be costs in the cause.

MULOCK, C.J., agreed with CLUTE, J.

RIDDELL, J. (dissenting):—The plaintiff had a horse and buggy standing on the north side of Dundas street, east of Margueretta street, the horse facing west. Coming out from a shop, he intended to drive away; he picked up the weight, put it into the buggy, and himself stood by the side of the buggy till a car went past east. As he picked up the weight, the horse turned his head to the car to go across; the plaintiff got into the buggy and sat there till another car went by to the east—then he picked up the lines and his horse started to cross—the last east going car having got about 30 feet away by this time. Two cars had passed to the west during this period. When crossing he saw a third west bound car when it came within four feet of his buggy, he grabbed the whip to get over, but did not succeed in escaping, the car struck the right hand front wheel, he was thrown out and hurt.

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He brought an action which was tried before Meredith, C.J. C.P., and a jury, at Toronto.

While the statement of claim does not particularize the negligence complained of, it is apparent from the proceedings at the trial that three acts of negligence were alleged: (1) not sounding the gong thereby lulling the plaintiff into a sense of security with the particular case; (2) not sounding the gong when the motorman saw that the plaintiff's horse was on the track, and (3) "the motorman saw him or ought to have seen him in sufficient time to have enabled him, if he had used the appliances which he had at his command, as he ought to have used them, to have stopped the car and have avoided the collision."

After much evidence had been given and after a careful and unexceptionable charge questions were left to the jury, which they answered thus:—

Q. 1.—Was the motorman guilty of negligence? A. Yes.

Q. 2.—If so, of what negligence? A. By not applying the brakes when he first noticed plaintiff heading across the tracks.

Q. 3.—Could the plaintiff by the exercise of reasonable care have avoided the accident? A. Yes.

Q. 4.—If he could in what respect was he negligent? A. In not seeing he had sufficient time to cross to the north side of the tracks in safety.

Q. 5.—Was the accident caused (*a*) by the negligence of the motorman? (*b*) or by the negligence of the plaintiff? (*c*) or by the negligence of both? A. Both.

Q. 6.—Could the motorman after he saw the plaintiff was about to drive across the tracks by the exercise of reasonable care have avoided the accident? A. No.

Q. 7.—If he could of what negligence was he guilty? A. In waiting until too late before applying the brakes.

Q. 8.—At what sum do you assess the plaintiff's damages? A. $800.

The learned Chief Justice was not satisfied with the answers and the following is the official report of what then took place:

His Lordship: Your answer to the 6th is inconsistent with the answer to the 7th.

Mr. Dewart (counsel for the defendants): I submit not.

His Lordship: Plainly so. You find they are both guilty of negligence and you find that the motorman was guilty in waiting till too late before applying the brakes. Now what does that mean in connection with 6?

Foreman of jury: He was too near to the man in the rig to stop to avoid the accident.

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His Lordship: Then why do you say that he was negligent in waiting until too late before applying the brakes? One or other of those answers is wrong, it strikes me, or are inconsistent with one another. Now, what is it you mean? Just state generally what idea you have in all this answer. Just state generally what you think was the position of the parties and the negligence of both.

Foreman: According to the evidence he had not a chance to do anything but what he did.

His Lordship: Then you should have answered this 7th question —you should not have answered the way you did: He was negligent in not applying the brakes; because that means that after he became aware the plaintiff was in danger he might have avoided the accident by putting on the brakes or by doing something. Is that what you mean, or do you mean the contrary?

Foreman: We mean the contrary—that he could not have done it in the time.

His Lordship: Then your 7th answer should be struck out. Now, which of these answers is to be taken as correct?

Foreman: We said he could not have avoided the accident when he noticed it.

His Lordship: Then the answer to the 7th should be struck out; because you say in effect that he could have avoided the accident if he had not waited until too late. I think you had better go back, consider it, and come back again. And make sure what you really mean.

The jury then retire, and after some time return again to the court-room.

They had struck out the answers to questions 6 and 7 altogether, but it was not noticed that they had struck out the answer to question 6. The report continues:—

His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame, and that the motorman, after he saw that the plaintiff was in danger, could have stopped his car. That is the effect of it?

The Foreman: Yes.

His Lordship: Mr. McGregor, I must endorse the record dismissing this action. The jury have been rather friendly to the street railway company. I cannot help it.

Were it not for what follows, I should have thought that what the learned Chief Justice said was "the motorman . . . could not have stopped his car." This as reported was a finding that the motorman could have stopped the car, that he was guilty of the ultimate and causal negligence, and would entitle the plaintiff to a verdict.

But the report continues thus:—

Mr. McGregor (counsel for the plaintiff) asks for a stay.

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His Lordship: I had not observed that the jury had struck out the "No" in answer to the 6th question. But I have asked them if their idea was that the motorman after he saw the position in which the plaintiff was could by the exercise of reasonable care have prevented the accident. They said that was their view. I will give you a stay.

There seems to have been some misapprehension at the trial and perhaps the report is not accurate. Neither party, however, offered or asked to have the reporter's notes examined to find if the official report is accurate: and we must deal with the case upon the material before us upon this appeal by the plaintiff.

On the notes as they stand, it would appear that the learned Chief Justice was referring to the first question and the answer already found—and not at all to the sixth and seventh questions.

Whether the jury so meant or whether they had changed their mind and thought the sixth question should be answered in the affirmative, may be doubtful—and if the case turned upon this, a new trial should be had.

But I do not think the matter of any importance in the present case. While it is the best and most convenient practice to submit in writing all questions which the jury are to answer, there is nothing in the statute (O.J.A. sec. 112) to compel this to be done; and I would consider that the answers of a jury to questions submitted orally from the bench are answers to questions within sec. 112. But it must be not tentative, but final answers that are to be so taken—consequently in this case we must, I think, look to the answers given after the jury returned the second time.

The result will be that the jury have found (1) negligence by the motorman (2) which would not have caused the accident had the plaintiff exercised reasonable care, but (3) "the motorman after he saw that the plaintiff was in danger could have stopped his car." Or if this be not the case, but the negligence referred to in answer to the first question is the same as that referred to in answer to the oral question: then the case is as put by Mr. Justice Meredith in *Jones* v. *Toronto and Y. R. Co.* (1911), 20 O.W.R. at p. 468, "no negligence on the part of the defendants causing the injury, negligence on the part of the plaintiff causing it, but . . . the defendants by the exercise of ordinary care might have avoided the injury." It makes no difference which way it is put—if the last finding of the jury be justified by the evidence, the plaintiff is entitled to his verdict.

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The question is: Could the jury upon this evidence have been justified in finding that the motorman could and should have stopped the car by any exertion at or after "the point at which it became reasonably apparent that the plaintiff intended to proceed in his course across the track: *per* Garrow, J.A., *Jones* v. *T. & Y. R.* (1911), 20 O.W.R. at p. 464. Any negligence prior to that time is "met by the finding of contributory negligence:" *per* Meredith, J.A., S.C. p. 468.

The only evidence apparently bearing upon that point is that of the motorman: he says:—

"Well, I had just been after passing a car going east bound just east of Margueretta, just on Margueretta at the east. I sounded the gong approaching that car, and just as the other car had got clear of me I noticed Mr. Herron's horse starting to come across, and I sounded the gong again. I saw that he was not going to stop. I would not say that I sounded the gong after that, but I put my best energies towards stopping the car, and I thought that I was going to succeed till I was about to hit him."

The view of the plaintiff and consequently that of the motorman had been at first obscured by the car going east.

Q. But in the position where you were, with the east bound car where it was, was it possible for you to see him? A. No.

Q. Were you on the lookout? A. Yes.

Q. Was there anything to take your attention away from your work at that time? A. Nothing at all.

Q. And were you on the job? A. I was on the job.

Q. From the time that you saw Mr. Herron until you brought the car to a stop, how far did the car go? A. I judge about a car-length.

Q. Where was the horse at the time the rig was struck? A. It had just crossed.

Q. The horse was clear of the north track? A. Yes.

Q. What kind of appliances had you on this car? A. Air-brakes.

Q. What condition were they in on that day? A. In good order.

Q. Did they work? A. Worked satisfactorily.

Q. Did you apply the reverse at all? A. I did.

Q. And how did it act? A. Worked all right.

Q. What kind of a stop did you make? A. I made a quick stop, as quick as I could.

Q. Were there any appliances there that you did not use? A. Well, I used the best appliances that I knew how to use at the time and the quickest.

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Q. And you understand how to use them? A. And I knew how to use them.

Q. Was there anything else you could have done to have made a shorter stop? A. I do not know of anything else; not any better.

I think that it could not be found on this evidence that the motorman was guilty of negligence after he saw or could have seen that the plaintiff "intended to proceed in this course across the track."

The plaintiff can tell nothing about the matter: he did not see the car "till it came crash right up against the rig about four feet off"—"it was right on top of me or close to me before I seen anything." Buchner heard the brakes put on but does not insist on this point.

McCormick says when he noticed the horse crossing the track then he heard the motorman ring the gong—"the door was open and the car began to slow down, but it did not quite stop before it struck the buggy—the motorman shut off the power, and put on the brakes and rang the bell."

Holden says the motorman "stopped the car as quickly as he could." Judge "heard the motorman put the brakes on, and . . . was almost thrown off his feet." Cowan, "the car approached him as if it were stopping—in a slow manner."

None of those witnesses helps at all in the enquiry now in hand—and I cannot see that any case is made of ultimate or causal negligence.

In my opinion the appeal should be dismissed with costs.

Note.—Since the above was written we have been informed by the official stenographer that his transcript of his notes is erroneous in leaving out the word "not" in two places. He says his notes read:—

His Lordship: The only change is taking out the answer to 7. What you say in effect is that both these people were to blame and that the motorman, after he saw that the plaintiff was in danger, could not have stopped the car. That is the effect of it?

The Foreman: Yes.

The second passage should read:—

His Lordship: I had not observed that the jury had struck out the "No" in answer to the 6th question. But I have asked them if their idea was that the motorman, after he saw the position in which the plaintiff was, could not, by the exercise of reasonable care, have prevented the accident. They said that was their view.

This clears up much difficulty and makes, in my view, inevitable the conclusion I have already arrived at.

New trial ordered; RIDDELL, J., *dissenting.*

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TOLLS.

MANITOBA DAIRYMEN'S ASSOCIATION v. DOMINION AND CANADIAN NORTHERN EXPRESS COS.

(File 4214.219.)

Board of Railway Commissioners. July 23, 1912.

1. CARRIERS (§ IV C—542*a*)—TOLLS—SAME COMMODITY FOR DIFFERENT USES.

On further consideration of a former order allowing express companies to charge higher rates on cream for domestic use than on cream to creameries for butter making, the Board held that such dual rates are anomalous and inexpedient, and having already established uniform rates east of Port Arthur on cream irrespective of its ultimate use, the Board in this case directed the express companies to install a tariff west of Port Arthur on the same principle.

2. CARRIERS (§ IV C—535)—JURISDICTION—POWERS—TOLLS AND RATES.

The Board is concerned with the correction and not primarily with the initiation of rates.

Manufacturers' Coal Rates Case, 3 Can. Ry. Cas 438; *Canadian Oil Cos. v. Grand Trunk R. Co.*, 12 Can. Ry. Cas. 350, at p. 355, followed.

3. CARRIERS (§ IV C—535)—TOLLS—REASONABLENESS—DECISIONS OF INTERSTATE COMMERCE COMMISSION.

The Board must find its criteria of the reasonableness of Canadian rates within Canada and while appreciating the regulative work of the Interstate Commerce Commission (U.S.) and treating the findings of that Commission with great respect, will investigate for itself the special circumstances of all cases coming before it.

THE application was heard at Winnipeg, March 25, 1912.

J. B. Coyne, for the Applicants.

W. H. Burr, for the Dominion Express Co.

F. H. Phippen, K.C., for the Canadian Northern Express Co.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

July 23, 1912. MR. COMMISSIONER MCLEAN:—The hearing in this matter, which was held in Winnipeg on March 25th, 1912, was the outcome of a series of negotiations which took their origin in the Board's judgment in the Express investigation.

At the hearing in Winnipeg on September 15th, 1911, in which complaint was made by the Manitoba Dairymen's Association against the Express Companies, on the ground that these companies had not made reduction in the tariff on sweet cream for butter making, as required by the Board's judgment in the Express Case, it was stated by Mr. Burr, on behalf of the Dominion Express Company, that the express companies had been figuring out a new schedule of rates which they desired to submit to the Board. It was suggested by the Board that further negotiations should take place between the express companies and the parties interested, to see if an agreement could be arrived at.

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Subsequent to this, negotiations were carried on between the express companies and the parties affected.

The question of the express tariffs on sweet cream, and on sour cream, in the territory west of and including Port Arthur, was dealt with in the Board's judgment in the express investigation. The disposition then made was that there should be a lower rate on cream to the creamery for butter making than upon that used for domestic purposes. It was stated by the Chief Commissioner: "It appears that there is considerable shipment of butter by express from these creameries. The cream is their raw material. The company gets some earnings from carriage of the finished product, and so it is perfectly in order to give a lower rate on cream to the creamery than upon that used for domestic purposes, so we think the intention of the company should be given effect to, and the business of the creameries be left undisturbed. The tariff to be filed may provide for the existing sour cream rate upon all cream when shipped to creameries for use in the manufacture of butter. The tariff to remain as it is upon cream for domestic purposes."

There is an obvious anomaly in charging different rates upon the same commodity moved under the same general conditions, the only reason for the difference being the final use. The Board, in an early decision on October 10th, 1904, when the Grand Trunk Railway applied for a ruling as to whether it would be allowed to continue a difference in the rate of freight on bituminous coal of 10 cents per ton between certain points on its line of railway, such reduced rates being in favour of the manufacturer as compared with that charged the dealer or consumer, ruled that it could not properly entertain such an application: *Manufacturers' Coal Rates Case,* 3 Can. Ry. Cas. 438. A similar position has been taken by the Interstate Commerce Commission, which has ruled that it is improper to so base a classification that it makes be devoted.

Jones Bros. Co. v. *M. & W. R. Co.,* 21 I.C.C. p. 579.

In its Conference Rulings it has laid down the position that "the carrier has no right to attempt to dictate the uses to which commodities transported by it shall be put in order to enjoy a transportation rate."

Rule 34, Conference Rulings Bulletin No. 4.

It has re-affirmed this position in its decision *In the Matter of Restricted Rates,* 20 I.C.C. 426.

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Its position is most succinctly put in the following words:—

"The rule is well established that a rate can not be based upon the use to which the commodity is to be devoted; neither can a rate be confined by its terms or application to an individual or a class; it must be open to all shippers alike." *Virginia Chemical Co.* v. *A.C.L. R.R. Co.*, 22 I.C.C. 397.

While it is true that the rate practice as to cream for butter making as distinct from cream for domestic use bore some features of analogy to the milling-in-transit privilege, it is apparent that the predominating consideration was that the practice was an established one. In the absence of further evidence, and in the lack of complaint in regard to the higher rates on cream for domestic purposes it was not deemed expedient to disturb the existing arrangement which the express companies had initiated.

It was, however, recognized at the time of the hearing, that there would be a difficulty in differentiating between cream for butter making and cream for domestic purposes. It was then stated in evidence by Professor Mitchell of the Manitoba Agricultural College that "there would be a disposition on the part of some to ship cream presumably for butter making purposes, when in reality it would be used for other purposes."

It was thought in the disposition under the judgment that the limitation of the butter making rate to cream "shipped to creameries for use in the manufacture of butter" would meet this difficulty. The existing difficulty in this regard was set out by Mr. Burr for the express companies, when he stated in the present hearing that they were "willing to allow the present tariffs on both classes to remain in effect if we can have some protection in the matter; if we can know what is one and what is the other. You will recollect, sir, that in a conference we had in Ottawa on the same subject, many months ago, this question was discussed, and we asked that the shippers or the consignees pay us the charges on the higher rate, and when they proved to us satisfactorily that a part of the consignment were on the lower rate class, we would make a refund. You asked us to confer with the Winnipeg people on this point. They refused absolutely to have anything to do with that."

In the hearing in Winnipeg in September, 1911, already referred to, the same matter came up incidentally in evidence, and it was stated by counsel for the applicants that the matter might be arranged by allowing the cream to be billed in on the butter making rate, and that thereafter the consignees could pay the

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express company the difference in rate on the portion of the consignments which might be used for domestic purposes.

The more carefully one examines the situation, the greater appear to be the difficulties of carrying out a dual system of tariffs based simply upon differences in the use of the commodity. One cardinal intention of the Railway Act is that there should be adequate publicity for clearly defined rates to be paid for services rendered. It is readily apparent that the dual system offers an inducement to an unscrupulous shipper to bill his cream on the butter making rate, when in reality it is to be used for domestic purposes. While no such evasion of the intention of the tariff may have taken place it is manifestly counter to the obvious intent and policy of the Railway Act to leave not simply a loop-hole but a wide open door available for such evasion. Such an arrangement sets a premium on perjury. It may happen also that there is an innocent evasion of the requirements of the tariff. Cream may be shipped in for butter making purposes. There may be some small surplus of sweet cream which is not used for this purpose and is sold for domestic uses. It would put a great burden upon the Creamery Company to keep exact tab on such small sales. It is also apparent that such a small sale might be made by an innocent employee of the company, and without any guilty knowledge of the management of the company.

The arrangement suggested by the company, namely, that all cream should be billed in on the higher rate, a refund being made on the portion which was used for butter making, is contrary to the policy of the Railway Act. It requires no elaboration to appreciate that this would leave a way open for rebating arrangements. On the other hand, the suggestion already referred to, that all of the cream should be shipped in on the lower rate, arrangements being made whereby a subsequent additional payment should be made for the portion of the cream used for domestic purposes is equally open to objection as contrary to the policy of the Railway Act in regard to rebates.

The tariff which was suspended on October 27th, 1911, provided for a uniform rate on cream irrespective of its use. Mr. Burr, on behalf of the express companies concerned, stated, both in a communication to the Board which is on file, as well as in his evidence in the present case, that the computations in regard to rates under the tariff in question were that 20 per cent. of the movement by express was for domestic use, and that 80 per cent. was for butter making. The following table sets out a comparison of the existing rates on sour cream; the rates on sweet cream,

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and the new rates proposed in the tariff to apply on all cream irrespective of use:—

CREAM RATES IN ALBERTA, SASKATCHEWAN, MANITOBA AND ONTARIO.

(West of Port Arthur.)

Miles	Rates on Sour Cream			Rates on Sweet Cream			New Rates applying on both kinds.		
	5	8	10	5	8	10	5	8	10
25	14	19	24	35	38	48	20	25	30
50	16	20	25	36	58	72	25	30	35
75	20	25	30	48	77	96	30	35	40
100	26	31	36	60	96	120	35	45	50
150	38	43	48	72	115	144	45	55	60
200	50	55	60	84	134	168	55	65	70
250	62	67	72	90	144	180	65	75	80
300	74	79	84	96	154	192	75	85	90

Mr. Carruthers, of the Crescent Creamery, stated that about 4 per cent. of the cream received by him was for domestic purposes, and about 13 per cent. was used in the manufacture of ice cream; the balance being used in the manufacture of butter. He stated further that during the year 1911, he had manufactured about 600,000 lbs. of butter. He contended that on account of the large amount of cream used in butter making any decreases in the rate on cream for domestic purposes would be more than neutralized by the increase in the rate on cream for butter making purposes, and he submitted a computation that at present the express charges on the total cream used in Manitoba would mean $42,000, while under the proposed tariff it would mean $66,000. or an increase of $24,000.

It was contended by various witnesses that the conditions in regard to cream shipments by express in the North-Western Provinces, were entirely different from those existing in the Province of Ontario. The essential point of difference referred to was the use of centralizing in connection with butter making. Mr. Carruthers testified that he had been engaged in the creamery business in Ontario and eastern Canada, and that he was more or less familiar with the conditions in eastern Ontario. The difference as between Manitoba and eastern Canada, he testified, was as follows:—

"Well the difference is this. In eastern Canada the population which is engaged in dairy farming is much more than it is

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here, and at every cross-road three or four miles apart there is a cheese factory or butter factory where the farmer delivers his goods to be manufactured, while in Manitoba everything has to be handled by the railroads to bring it to one common point, as there is no part of Manitoba that has population enough to support any local factory, either cheese or butter."

The same witness further testified:—

"I should judge that any shipments of cream in Ontario would be used for domestic use in large cities such as Toronto, Montreal and such points."

He further testified he did not know of any factory operating in either Ontario or Quebec on the same system as his company. Professor Mitchell, in his evidence, corroborated the evidence of Mr. Carruthers, stating that the cream in Ontario for butter making purposes is practically all handled in an entirely different way from that in which it is handled in Manitoba, and that it is not shipped by express to any extent.

In such a comprehensive investigation as was carried on in the general investigation of Express Rates, it necessarily follows that the general principles laid down do not exhaust the scope of regulative power. The Board was concerned with the investigation of the rates and practices of companies which had been a very much shorter time subject to the regulative jurisdiction of Parliament than had the railway companies. The scope of such a general investigation was, therefore, of necessity concerned with the blocking out of general reforms. The work of regulation in regard to express rates, instead of having been completed by the Express judgment was simply begun by it. It will of necessity follow that in many cases complaints in regard to rates and practices will have to be dealt with from time to time. Some of these complaints may arise from conditions which were not developed at the time of the general investigation. Others may develop from conditions which were imperfectly set before us. At any rate it is apparent that some time must elapse before a complete body of regulative experience in regard to express rates in Canada is developed, and this will be developed when dealing from time to time with complaints, both general and special, as they arise. This was affirmatively recognized in the express judgment itself which, in dealing with the matter of rate complaints from various points in the West said: "But these are not dealt with, as it is considered that the better course to pursue is to await a general revision and re-alignment that must follow

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these findings, when if a more satisfactory situation is not brought about complaints that have not been dealt with categorically or solved in the general result, will be further considered."

The express companies, since the issuance of the judgment in the Express investigation, have been re-aligning and re-arranging their rates. The experience of the Board in connection with this shews that further work is to be done and this will be dealt with.

In the evidence and statements submitted, reference was made to conditions existing in the adjacent Northwestern States, and it was contended by counsel for the applicants that the decisions as to express rates in these adjoining states gave the measure of what should be reasonable in the present case. It was stated in general terms by Mr. Carruthers, and by Professor Mitchell, that the conditions in these adjoining states of the American Union were practically identical with those existing in the Canadian North-West. It was stated on the other hand by Mr. Burr that the conditions were dissimilar. But the situation is that the Board is left simply with two sets of assertions, neither of which is backed up by any evidence to substantiate the similarity or dissimilarity alleged. The Board has already held that where the traffic compared moves over two different routes, this precludes the mere reference to difference in mileage rates being taken as *primâ facie* evidence of discriminatory treatment, and that this held with especial force where comparisons are made with the rates of railways which are not subject to the Board's jurisdiction.

Canadian Oil Companies v. *Grand Trunk, Canadian Pacific and Canadian Northern Railway Companies,* 12 Can. Ry. Cas. 355.

The same line of reasoning covers the allegation of similarity of circumstances; a *primâ facie* case as a similarity of circumstances must be made; but this is not done by mere allegations.

This Board has always appreciated the value of the regulative work done by the Interstate Commerce Commission, and its findings have always been held in esteem. But the Board in holding that the decisions of that Commission are applicable in their entirety here only in cases where circumstances in Canada are on all fours with the circumstances upon which the aforesaid decisions depended has recognized the burden placed upon it by Parliament of investigating the special circumstances of the cases coming before it. The Interstate Commerce Commission itself, in dealing with the situations arising from the regulation of

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rates by State Railway Commissions, has said that while upon general principles of comity the action of a State Commission in fixing rates on state traffic must be treated with all due respect, at the same time the Interstate Commission has never felt itself bound to accept a state-made rate as the necessary measure of an interstate rate. That is to say, it must examine the circumstances for itself.

E. E. Saunders & Co. v. *Southern Express Co.*, 18 I.C.C. 415.

Sufficient justification has been advanced for doing away with the anomalous situation of two tariffs dealing with the same commodity; the difference in rate being dependent upon the difference in use. The Board has already recognized the advantage of having a uniform tariff on cream irrespective of its use in the section east of Port Arthur. The Board, by its Order No. 13381, of March 21st, 1911, dealing with the situation east of Port Arthur, fixed certain express rates on cream for butter making, and a tariff of higher rates on cream for purposes other than butter making. It was found in practical operation that this arrangement was unsatisfactory, and accordingly Order No. 14594, of August 21st, 1911, was issued fixing uniform rates for cream irrespective of the use to which the commodity was applied. Such an arrangement having been made east of Port Arthur, the question faces the Board, are the conditions sufficiently dissimilar west of Port Arthur to warrant a different treatment? As I construe the Railway Act the Board must find its criteria of the reasonableness of Canadian rates within Canada. I further apprehend that while it is the policy of the Railway Act to foster elasticity of rate making in so far as it is compatible with public policy, and that to this end the railways are permitted to vary rates with circumstances and conditions subject to the onus of disproof if these rates are shewn to be *primâ facie* discriminatory, there is not the same broad discretion vested in the Board. In other words, the Board being concerned with the correction not primarily with the initiation of rates must carefully consider in regulating rates in one section of Canada what it has done in another section of Canada. The railway, and what is here said, covers the express company as well, having its finger on the pulse of trade may quickly vary rates to meet changing needs. The Board has not, and was not intended by Parliament to have this direct relationship, since its powers are invoked only where grievances arise. It is concerned with corrective, not with experimental, rates.

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As has been noted, it was contended in the course of the hearing in the present case, that the conditions in regard to centralization differentiate the situation west of Port Arthur from the situation east thereof. The Board has, however, found on investigation, that the centralizing system is gradually increasing in Ontario with which special comparisons were made in the course of the hearing. It is advised by the Dairymen's Association of Western Ontario that the amount of cream shipped by express for butter making purposes is at least as great as that shipped for domestic purposes. The T. Eaton Company, which has the largest centralizing plant in Western Ontario, manufactured in 1911, 841,000 pounds of butter. This company advises the Board that the relative percentages of cream shipped into their factory by express for butter making are as compared with the shipments for domestic purposes 93⅝ per cent. and 6⅜ per cent. Statements from other plants shew that the percentage shipments of cream by express for butter making purposes are steadily increasing. On due consideration of the whole matter, it appears justifiable to take what has been done by the Board in the section east of Port Arthur as a measure of what it should do in the section west of Port Arthur.

The tariff covered by the Board's Order No. 14594, above referred to, covers distances up to 200 miles. As the situation in the present case requires a longer mileage the rates may be stepped to 300 miles on the same basis as set out in the Order, and indicated in the following table. The following tabular summary sets out a comparison of the western sour cream rate, the western sweet cream rate, the eastern uniform scale and the uniform scale proposed by the express companies:—

Miles	Western Sour Cream			Western Sweet Cream			Eastern Uniform Scale			Proposed Uniform Scale		
	5	8	10	5	8	10	5	8	10	5	8	10
25	14	19	24	35	38	48	15	20	25	20	25	30
50	16	20	25	36	58	72	18	26	31	25	30	35
75	20	25	30	48	77	96	22	31	36	30	35	40
100	26	31	36	60	96	120	26	36	41	35	45	50
150	38	43	48	72	115	144	34	46	51	45	55	60
200	50	55	60	84	134	168	42	56	61	55	65	70
250	62	67	72	90	144	180	50	66	71	65	75	80
300	74	79	84	96	154	192	58	76	81	75	85	90

I am, therefore, of opinion, that the express companies should instal within thirty days from date of the Order making this judgment effective, a tariff west of Port Arthur, which will put

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into force the same provisions as are contained in the Board's Order No. 14594, subject to the rates for 250 and 300 miles being stepped as indicated. Further additional mileage, where necessary, should be covered by the tariffs on the same scale.

THE ASSISTANT CHIEF COMMISSIONER concurred.

TOLLS—TELEGRAPHS.

CANADIAN PRESS v. GREAT NORTH WESTERN, WESTERN UNION AND CANADIAN PACIFIC RAILWAY TELEGRAPH COS.

(File No. 12002.1.)

Board of Railway Commissioners. May 10, 1912.

1. TELEGRAPHS (§ I—6)—TELEGRAPH TOLLS—UNREMUNERATIVE BUSINESS.

The Board refused to order telegraph companies to provide special tolls for press service similar to tolls provided by another telegraph company under special agreement when it appeared that the objecting companies had not sought the press business or provided the necessary facilities for it and that it would be unremunerative.

2. TELEGRAPHS (§ I—6)—TELEGRAPH TOLLS—UNJUST DISCRIMINATION.

The Board held that an increase from 25 to 50 cents per 100 words in telegraph tolls for "press specials" in the Maritime Provinces, while the former rate of 25 cents was continued in Ontario and Quebec was *primâ facie* an unjust discrimination against the Maritime Provinces and in the absence of evidence of special circumstances justifying the difference in rate ordered the former rate to be restored.

THE application was heard at Toronto, May 1, 1912.

E. W. McCready, for the Applicant.

R. V. McKinnon, for the Maritime Provinces papers.

Geo. D. Perry, for the Great North Western Telegraph Co. and the Western Union Telegraph Co.

W. J. Camp, for the Canadian Pacific Railway Telegraph Co.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

May 10, 1912. THE ASSISTANT CHIEF COMMISSIONER:—In this matter the applicant was represented by Mr. E. W. McCready, the manager of the *St. John Telegraph* and the *St. John Evening Times;* and Mr. R. V. McKinnon, representing the Maritime Provinces papers.

The application was twofold. First, that the Great North Western and the Western Union Telegraph Companies be ordered to provide special tolls for press services similar to tolls which the Canadian Pacific Railway Company's Telegraph had established

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by agreement with the Press Association; and, second, that the Canadian Pacific Railway Company's Telegraph, the Great North Western, and the Western Union Telegraph Companies, be ordered to restore the rate in the Maritime Provinces of 25 cents per 100 words, for "press specials," which had been in effect prior to the 1st September, 1910.

With regard to the first portion of the application, I am of the opinion that the applicant's request should not be granted. About two years ago the question of the collection and despatch of news for the press by the Canadian Pacific Railway Company's Telegraph, as well as the rates charged for such service was before the Board, and an agreement was arrived at between the parties interested and new rates put into effect. The Great North Western and Western Union Telegraph Companies were not parties to that agreement, and they had not sought the press business, or provided the special facilities for its collection and distribution which the Canadian Pacific Railway Company's Telegraph had. The Great North Western and the Western Union Telegraph Companies contend that the applicant's business would be unremunerative and they do not want it at the rates which are paid the Canadian Pacific. Under these circumstances, I see no justification for imposing this burden upon these companies.

With regard to the other branch of the application: It appears that for many years, prior to the 1st September, 1910, the telegraph companies carrying on business in the Maritime Provinces gave a rate of 25 cents per 100 words on what was called "press specials," *i.e.*, a special despatch to an individual newspaper. This rate had been voluntarily established by the companies. Twenty-five cents per hundred words is to-day and for many years has been the rate charged in Ontario and Quebec for such service. On or about the 1st September, 1910, the telegraph companies commenced charging 50 cents per 100 words for "press specials" in the Maritime Provinces, although the 25-cent rate for similar service was continued in Ontario and Quebec. This, I think, establishes a *primâ facie* case of unjust discrimination against the Maritime Provinces, and as at the hearing the companies did not establish that there were special circumstances and conditions which justify the difference in rate, I think this portion of the application should be granted, and the telegraph companies ordered to restore the 25-cent per 100 words rate in the Maritime Provinces.

COMMISSIONERS MILLS and MCLEAN concurred.

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TOLLS—REBATE.

KENNEDY v. QUEBEC & LAKE ST. JOHN R. CO.

(*Q.R.* 39 *S.C.* 344.)

(Translation.)

Quebec Superior Court, Lemieux, J. February 16, 1911.

CARRIERS (§ III E—425)—*Railways—Freight Tolls—Rebate Agreement—By-laws to Fix Tolls and Approval of Lieutenant-Governor-in-Council.*

Held, The rebate agreement upon freight charges between a railway company and a forwarder, made in the absence of a by-law or of a resolution of the shareholders of the company at a general meeting and approved by the Lieutenant-Governor-in-Council, violates the prohibition embodied in section 6607 and following R.S.Q. 1909, is consequently null and void and leaves the forwarder without redress.

February 16, 1911. LEMIEUX, J.:—Kennedy claims $4,533-.13 from the Quebec & Lake St. John Railway Company, being the amount of re-billing charges, refunds or *rebates* upon freight charges, at $1 per car, for the following: upon 4,200 car-loads of wood shipped by him from November, 1906, to November, 1908, over the defendant company's line of railway, the whole in accordance with certain contracts in writing entered into in the months of August and October, 1903.

The company pleaded that these contracts were unlawful and against public order; because by granting special rates to Kennedy, they created an unjust and illegal preference over all the other merchants shipping freight over the railway of the defendant; that the rates invoked by Kennedy had not been regularly authorized by the company, nor by the Quebec Railway Commission, under whose control the company is.

The defendant further pleaded that the contracts relied upon by plaintiff are reciprocal, and as Kennedy had not fulfilled his part of the bargain he could not avail himself of that part of the contracts which imposed obligations upon the company.

The following are the facts which have given rise to the present law-suit.

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Kennedy is the most extensive shipper of wood within the territory served by the railway company; he controls five mills strung out along the right of way, at a distance varying from twenty-three to fifty-seven miles from Quebec, at the following points: Lake St. Joseph, St. Raymond, Long Lake, Perthuis and Rivière-à-Pierre.

Within the same territory there are a number of wood merchants who, at the same points or at other ones, ship wood over the line of the defendant company.

In 1903, evidently with the intent of mutual interest and to facilitate, on the one hand, the development of Kennedy's business, and on the other, to increase traffic upon the defendant company's line, Kennedy and the company, on August 26, entered into a contract whereby the company for the period of five years granted special rates to Kennedy, which are set forth in detail in the deed, in consideration of his shipping his wood over the defendant company's line of railway.

By the contract, Kennedy covenanted to ship all the wood manufactured by him at the above mentioned points and upon the St. Ann river and its tributaries. The quantity of wood so to be shipped by Kennedy was approximately 3,500 cars per annum.

On October 8, 1903, that contract was varied by a letter from the company's manager, whereby the company agreed to pay Kennedy a re-billing charge or *rebate* of $1 per car upon the ordinary freight rate, payable semi-annually upon all cars loaded with wood, and shipped by him over the company's line, with the exception of pulp-wood.

The contract of August 26, varied by the letter of October 8, meant, according to the proof of record, a reduction of 30% in Kennedy's favour from the regular rates of the company, as approved by the Lieutenant-Governor-in-Council and in force since January 1, 1902.

During three years, from November 1, to November 1, 1906, the above-mentioned contract, securing a special preferential

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tariff to Kennedy, was observed by the parties, and each year the company paid the re-billing charge or *rebate* of $1 per car upon the cars of wood shipped by Kennedy, according to statements furnished by him establishing the number of cars.

From November, 1906, to November, 1908, the company has refused to carry out the contract and, more particularly, to pay the re-billing charge or *rebate* of $1 per car. Hence Kennedy's present proceedings to recover the sum of $4,310.00, representing a *rebate* of $1 per car upon 4,310 cars of wood, shipped by him during those two years over the defendant company's line.

Let us scrutinize the objections advanced by the company to defeat this claim.

Firstly, the company has pleaded that the special preferential rate granted to Kennedy by the contract, was an unlawful monopoly and an unjust preference over the other merchants who shipped by the defendant company's line.

At the hearing, the plaintiff answered this objection by stating that the other shippers benefited from practically analogous rates; that the rates enjoyed by Kennedy did not constitute an advantage, nor a monopoly or unjust privilege, and he cited the Railway Act, section 5172, sub-section 6, as shewing the lawfulness of the rate fixed and established by the defendant company in Kennedy's favour.

Sub-section 6 reads as follows:—

"All or any of the tolls may, by any by-law, be reduced and again raised, in whole or in part, as often as deemed necessary for the interests of the undertaking; but the same tolls shall be payable at the same time and under the same circumstances, upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to tolls." (R.S.Q. 1888).

The proof revealed that other forwarders, among others Turner, Auger, the Bayles Company, had special tariffs and less than those approved by the Lieutenant-Governor-in-Council; that these tariffs were not materially different from Kennedy's, although his were not quite so high.

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It does not appear that serious complaints were made to the company by the other forwarders against the tariffs granted to Kennedy.

Under the circumstances, considering the nature of the contract, the carrying out of the contract during three years by the company, the special rates granted to other forwarders, the absence of complaints, the considerable quantity of wood shipped by Kennedy and the resultant advantage thereby accruing to the company, the Court would be disposed, as a question of fact, to come to the conclusion that the tariffs granted to Kennedy did not create an advantage over, nor an unjust monopoly towards the other forwarders.

But the discussion does not stop there.

The second objection by the company is of an essentially legal character. It is formulated in the plea in the following words: —"The tolls upon which the plaintiff bases himself to recover the amount claimed by the present action, are illegal, seeing that they have not been regularly authorized by the defendant, nor by the Quebec Railway Commission, under whose control the defendant company was."

To decide this question, it becomes necessary for us to consult the Railway Law which was in force at the date of the contract, namely August 28, and October 8, 1903. This Law will be found in the Revised Statutes of Quebec, 1888, in section 5172 already referred to.

The first paragraph of this section reads as follows:—

"Tolls shall be, from time to time, fixed and regulated by the by-laws of the company or by the directors, if thereunto authorized by the by-laws, or by the shareholders at any general meeting."

Sub-section 6 is the one which we have already quoted above.

Sub-section 9 reads as follows:—

"No tolls shall be levied or taken until approved of by the Lieutenant-Governor-in-Council."

In 1906, sub-section 6 was repealed by 6 Edw. VII., ch. 32, section 8, which provides to that effect.

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At the hearing, the learned counsel for the defence argued, without backing up his arguments by precedents, or authorities, that the repeal of sub-section 6 had a retroactive effect, or had the effect of taking that sub-section out of the statute, as if it had never been inserted therein, or as if it had never formed part thereof.

Doctrine and jurisprudence are unanimous in agreeing that the repeal of a statute or of the clause of a statute does not affect any rights, advantages or actions acquired under the statute, before its repeal. There is an exception in certain questions of practice or certain penal matters, when the repealed statute is replaced with another.

The opinion of the authorities and of the jurisprudence is well summarized by Hardcastle on Statutory Law, p. 376:—"If a right has once been acquired by virtue of some statute, it will not be taken away by the repeal of the statute under which it was acquired. The law itself, says Puffendorf, in his *Law of Nature and Nations,* may be disannulled by the author, but the right acquired by virtue of that law, whilst in force, must still remain; for, together with a law, to take away all its precedent effects would be a high piece of injustice."

26 Amer. & Eng. Ency., p. 745; *Attorney-General* v. *Lamplough,* L.R. 3 Ex. Div. 223; Maxwell on Statutes, p. 623; Endlich, on Interpretation of Statutes, pp. 684, 685; Burrow's Rep., p. 2463; 6 Adolphus & Ellis, p. 943.

This incidental objection of the defendant having been disposed of, let us now return to the principal objection raised by the plea, namely, that the contract and special rates in Kennedy's favour are illegal and *ultra vires* of the powers of the company, seeing that they have not been lawfuly authorized by it, nor by the Railway Commission.

Corporations have no other powers than those which are conferred upon them by law and by their charter, and they cannot exercise their powers otherwise than according to law. This is the law embodied in the Civil Code, articles 358 and 360.

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Article 358 declares:—"The rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation."

Article 360:—"These officers represent the corporation in all acts, contracts or suits, and bind it in all matters which do not exceed the limits of the powers conferred on them. These powers are either determined by law, by the by-laws of the corporation, or by the nature of the duties imposed."

The Railway Act, section 5131, reiterates these rules of the Civil Code and makes them applicable to railway companies, by decreeing that "every company, established under any charter, shall be a body corporate, under the name declared in the charter, and shall be vested with all the powers, privileges and rights, which are or may be necessary to carry into effect the intentions and objects of this section and of the charter granted for that purpose, and which are incident to such corporations, or are expressed or included in the Civil Code."

By sub-section 17, section 5134 of the same Revised Statutes, it is further provided that "the directors shall make by laws for the management and disposal of the stock, property, business and affairs of the company, not inconsistent with the law, and for the appointment of all officers, servants and workmen, and prescribing their respective duties."

But, when the Railway Act speaks of tolls, it declares, in section 5172:—"Tolls shall be, from time to time, fixed and regulated by the by-laws of the company, or by the directors, if thereunto authorized by the by-laws, or by the shareholders at any general meeting," And when the same statute refers to preferential or special rates, it states, in sub-section 6 of section 5172:—"All or any of the tolls, may, by any by-law, be reduced and again raised, in whole or in part, as often as deemed necessary for the interests of the undertaking. . . ."

One or the other of these clauses requires, in the case of the creation of general or special tariffs, as a condition precedent

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to their establishment, that they be fixed by the by-laws of the company, or by the directors, if thereunto authorized by the by-laws

By section 5139 of the Statute to constitute a by-law it is necessary that it should have been regularly made and adopted, reduced to writing, signed by the chairman and be kept in the office of the company. All such by-laws, shall in addition, be submitted to the Lieutenant-Governor-in-Council for approval.

The result to be arrived at after studying the law cited and the conditions required for the adoption of general or special tariffs, is that such tariffs should be created by by-laws authorizing their establishment, or by the directors, if thereunto authorized by the by-laws, or by the shareholders at any general meeting.

The president alone, or the manager alone, as in the present case, cannot create any special or general tariff; the Law does not permit of it.

The question of freight rates is one essential to the existence and success of a railway company, and the Law was not willing that a question of that nature should be decided by a president or a director alone, but it is its expressed wish that it be regulated and fixed by by-laws, or by the directors, thereunto authorized by the by-laws, or by the shareholders at any general meeting.

The Law is formal and imperative on the point, and there are no means of evading it.

The defendant company pleaded that the contract given to Kennedy had not been lawfully authorized by the company.

Under the circumstances, the burden was upon the plaintiff to establish that the special rates granted to him, under a contract signed solely by the president and the manager of the company, were authorized by a by-law of the company, or by the directors, thereunto authorized by a by-law. There is no such proof of record. The plaintiff did not even attempt to put it in. The consequence is that his suit should stand dismissed.

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The defendant raised a third objection, namely, that Kennedy had covenanted to ship, each year, approximately 3,500 carloads of wood, and that during the years 1906 to 1908, instead of having forwarded 7,000, as stipulated, he had only shipped 4,200. The defendant company concludes from this that Kennedy not having fulfilled his contract, it cannot be compelled to carry out its obligation of paying him a *rebate* of $1 per car upon 4,200 cars.

This is true, but the company had never made a complaint during that period of time, or at least during the first year. On the contrary, it carried in its books, to the credit of Kennedy, the number of cars forwarded by him, according to a statement furnished by Kennedy and approved by the officers of the company. This entry in the books would constitute an admission on the part of the company which would go far in justifying a judgment against it, if the contract had been lawful, or if at least it had been properly authorized.

The suit must stand dismissed. But, seeing the common error of the parties, an error which is far more grave on the company's part, because it should have known its rights and privileges better than Kennedy, seeing also, that during a period of three years it had carried out the contract and that, during the whole of that time and since down to the date upon which suit was entered, it left Kennedy under the impression that the contract was lawful, the suit is dismissed, but each party will pay his own costs.

Pentland, Stuart & Brodie, for the Plaintiff.
Taschereau, Roy, Cannon & Parent, for the Defendant.

See next case.

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KENNEDY v. QUEBEC & LAKE ST. JOHN R. CO.

(*Q.R.* 21 *K.B.* 85.)

(Translation.)

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Cross and Gervais, JJ.

RAILWAYS (§ III E—425)—PROVINCIAL RAILWAYS—FREIGHT TOLLS—REBATE AGREEMENT—POWER OF DIRECTORS OF RAILWAY COMPANIES TO ACT WITHOUT THE AUTHORITY OF THE SHAREHOLDERS.

Held, 1. An agreement between a provincial railway company and a shipper whereby a *rebate* is allowed upon freight tolls is not a violation of art. 5172 R.S.Q., 1888, art. 6607 *et seq.* R.S.Q, 1909, unless it entails an undue preference or advantage. Hence, if entered into for special reasons, *e.g.*, the obligation of the forwarder to ship all his products over such railway, to himself pay the cost of loading and unloading, etc., the agreement is presumed to be lawful, until it is shewn to conceal an injustice.

2. The directors of the company, without being specially authorized thereto by the shareholders, have the power and capacity to enter into the aforesaid agreement.

THE judgment appealed from, which is reversed, is reported in 39 S.C., at pages 344 and following.

December 7, 1911. ARCHAMBEAULT, C.J.:—The appellant in this case was plaintiff in the trial Court. He claims from respondent company the sum of $4,533.13, which he alleges to be due him by virtue of a contract between them, of date 1903.

The appellant is proprietor of timber limits and of saw mills, within the territory served by the respondent's line of railway. In 1903, a contract was entered into between the parties, whereby the appellant agreed to ship all lumber manufactured by him in respondent's cars. On its side, the company undertook to give a rebate from the ordinary freight tolls. The life of the contract was for five years, from November 1, 1903, to November 1, 1908. The rebate of the tolls at first consisted in a discount; but this was later substituted by a refund of one dollar per car. The appellant contends that the respondent owes him the amount claimed by the action by virtue of this refund or *rebate* agreed upon between them. The sum now sued for represents the last two years covered by the contract, namely, from November 1, 1906, to November 1, 1908. Up to November 1, 1906, that is to

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say, during the first three years of the life of the contract, the respondent allowed appellant the rebate as agreed upon.

Respondent advances three grounds of defence in reply to appellant's suit.

It urges: 1. That the contract relied upon by appellant is unlawful, in that it embodied an undue preference or advantage; 2. That the contract was not authorized by the shareholders of the company, and, consequently, was *ultra vires* of its directors; 3. That appellant failed to discharge his own obligations under the contract, the consideration for which the rebate in question was promised, and, as a corollary, he is without right in seeking the recovery from defendant of the amount represented by the rebate.

Let us examine these three grounds of defence.

In the first place, respondent urges that the contract is unlawful because it purports to give appellant an undue advantage. This ground of defence is based upon paragraph 6 of article 5172 of the Revised Statutes of 1888 (articles 6607 and following R.S.Q. 1909), the law applicable to the contract in issue. Article 5172 contains provisions respecting tolls which a railway company may establish. Such tolls must originate from by-laws approved by the Lieutenant-Governor-in-Council. Paragraph 6, in effect, declares that such tolls may be reduced whenever deemed necessary in the interests of the railway, but the same tolls must be exacted, at the same time and under the same circumstances, so that no undue preference or advantage shall accrue to whomsoever. It is to be observed, therefore, that the only restriction controlling the reduction of its tariffs by a railway company is that no advantage or privilege should be allowed any one shipper which would be unjust to other shippers. As a general rule, it is not forbidden to grant rebates or allow discounts. What the law does not countenance, however, are rebates or discounts which consist in undue preference or advantages. "It is not unlawful to charge less than the schedule rate in a particular case, where the purpose is not to discriminate between shippers. In general, a contract to repay a portion of the freight charge by way of re-

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bate, is not unlawful and may be enforced. But a rebate contracted for with the view of making an unlawful discrimination, cannot be recovered." (Cyc., see Carriers, vol. 6, p. 500.) "It is not preference, but undue preference, that is forbidden." (Halsbury's Laws of England, see Carriers, vol. 4, p. 76.)

The question rests necessarily upon the circumstances of each case. It is a question of fact left to the appreciation of the court. "The mere fact that one customer of a railway company is given an advantage over another is no conclusive proof of undue preference, and it must always be a question of fact whether, or not, preference is undue." (Halsbury, *loco citato.*) "Usually, the question of whether there is an unjust discrimination is a question of fact for the jury." (Cyc. *loco citato.*)

If a rebate in the tariff be granted absolutely and without conditions, the presumption might be fairly made that it was an undue preference; and such presumption would have to be destroyed by evidence to the contrary, if the claim was put forward that the rebate did not create an undue preference. But if, as in the present case, a reduction of tolls is agreed upon for special reasons, whether under the guise of discounts at the time of payment, or of rebates after payment, certainly no presumption of injustice subsists. It is upon the party alleging the undue preference that lies the burden of proof. I have searched the record before me for any evidence establishing the existence of any such undue preference; I find no trace of it. A special contract was entered into between the parties. The appellant undertook to ship all his lumber over the respondent's line of railway. Each car was to be loaded with not less than 12,000 feet of lumber. The appellant was held, at his own cost, to see to the loading and unloading of the cars. As the respondent itself admits, in its factum, it was a reciprocal contract. Each of the contracting parties therein assumed certain obligations. Neither of them can require from the other fulfilment of his obligations without discharging those which he undertook to carry out himself. The contract declares that it is in consideration of the

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covenants assented to by appellant, that special conditions were conceded him for the carriage of his products. Under these conditions, how can we declare, in the absence of proof upon the point in the record, that the respondent does not collect the same freight tolls from every one, at the same time and under the same circumstances? It is not established that other shippers, finding themselves in the same conditions, were not able to secure the same tolls. On the contrary, it is proved that other shippers than the appellant were successful in securing special conditions from the respondent, equivalent, or practically so, to those obtained by appellant.

The first ground of defence of the respondent is unfounded. No proof exists that the contract in issue purported to give any undue advantage or preference.

In the second place, the respondent claims that the contract is null and void because the tolls enjoyed by appellant were not authorized by the by-laws of the company, nor by the directors duly authorized to that effect. We have just seen that the contract did not purport to confer any undue preference upon appellant. We have also seen that a railway company can grant tariff rebates, provided such rebates do not embody any undue preference. It follows, therefore, that a contract which does grant a rebate, in a special case, for a consideration, is a simple act of administration, which is within the powers of the directors, and which requires no antecedent authorization, or any subsequent ratification, by the shareholders. The law says that when it is a question of preparing a general tariff, a resolution of the shareholders and the authorization of the directors become necessary. But no such conditions are required when the question is respecting a special agreement exempting a special case from the application of the general tariff. The law on this point has been changed since 1903. In 1906, a statute was passed repealing paragraph 6 of section 5172 of the Revised Statutes of 1888. Maybe the effect of this repeal is that railway companies no longer have the right to grant tariff rebates, even when they do not purport to give an undue preference. But this amendment

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of 1906 can in no way influence the contract entered into between the parties, in 1903. In the absence of a special clause to that effect, laws are not retroactive. For this reason, I am of the opinion that the second ground of defence urged by the respondent is not well founded. But there is a further reason for reaching this conclusion. When the directors of a company act in the name of the company, within the limits of their powers, they are presumed, with respect to third parties of good faith, to be authorized to represent the company. If they were not so authorized, it then becomes a question between them and their shareholders. Third parties cannot be affected thereby. This question is now well established in the jurisprudence of England. Here is what Lord Lindley says upon the subject in his "Law of Companies": "It may be taken as now settled that persons dealing with directors *bonâ fide,* and without notice of an irregular or improper exercise of their powers, are not affected by such irregularity or impropriety" (p. 219). Lord Lindley cites several cases wherein this doctrine is approved. Amongst other cases cited is that of *Royal British Bank* v. *Turquand,* 6 E. & B. 327, in which the following remarks are credited to Lord Campbell: "If no illegality is shewn as against the party with whom the directors contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders." Upon an appeal, in the same case, Jervis, J., expressed himself in the same vein. Here is what he is reported to have said: "Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that, which on the fact of the document appeared to be legitimately done."

In the case now before us, the contract was signed in the name of the company. The president who signed is, therefore, to be presumed as having the requisite authority. This presumption, which the decisions of the courts has determined, arises from the simple fact that the directors acted in the name of the company, is considerably strengthened here by the circumstances of the case. The directors should have been authorized

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by the shareholders to settle this question of the tariff. The Quebec and Lake St. John Railway has been operated for a long period of years. The law, as we have seen, does not allow railway companies to collect tolls unless a by-law has been adopted to that effect, and that such by-law has received the assent of the Lieutenant-Governor-in-Council. The respondent, therefore, could not collect tolls in the absence of a by-law. On the other hand, it could not carry on its railway without collecting tolls. Hence, its shareholders must have necessarily authorized its directors to adopt by-laws concerning tolls. Thus, it is established that in 1902 and in 1904, the directors of the company had certain tariffs approved by the Lieutenant-Governor-in-Council. This approval of a tariff by the government is assuredly an element which strengthens the presumption I have already given voice to, that the directors had been authorized by the shareholders to establish tolls. This presumption is still more strengthened from the fact that the company faithfully lived up to the contract during a period of three years, that annual meetings of the shareholders were held during that time, and that the company's books shew that the stipulated rebates were paid during that period of time. Under such circumstances, the company cannot now invoke absence of proof of authorization on the part of the shareholders to relieve it from the obligations assumed by its directors. I pass over in silence the question of the execution, by the appellant of his obligations under the contract. To go into this aspect of the case would be of no importance, once we have arrived at the conclusion that the respondent is bound to pay to appellant the rebates agreed upon between them, for the reasons I have just mentioned.

In the third place, the respondent urges that appellant's suit should stand dismissed because he has not fulfilled his own obligations under the contract between them. This ground of defence is based upon the fact that, during the last two years of the existence of the contract, from November 1, 1906, to November 1, 1908, the appellant did not load 7,000 cars, as he

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agreed to do, but only 4,200 cars. The contract contains no clause providing for the loading of 3,500 cars per annum. This figure was mentioned as an approximate estimate of the probable shipments, but it was not a consideration of the contract. It is in evidence that the appellant, as a matter of fact, did ship over the respondent's lien of railway, all the lumber manufactured by him; that was the only obligation he assumed under the contract. This ground of defence urged by the respondent is no better founded than the foregoing ones.

All the reasons for nonsuiting the appellant having been brushed aside, it follows that the judgment which dismissed appellant's action was wrong. The amount claimed is due by the respondent. This amount includes that due for the 4,310 cars shipped from November 1, 1906, to November 1, 1908, that is to say, $4,310. The appellant also has the right to recover interest claimed by him. This is a commercial transaction, and default accrues by the mere expiry of the term.

The judgment of the trial Court, which dismissed the action, is set aside, and appellant's suit is maintained for the amount sued for, with interest thereon from the date of the issue of the writ.

CROSS, J.:—The two grounds of defence put forward by the defendant-respondent were in substance: firstly, that the contract sued on was void, as having been made in violation of law, in that it purported to give plaintiff an undue advantage in freight rates over other shippers; and, secondly, that the freight rates relied upon by the plaintiff were illegal, because of not having been regularly authorized, either by the defendant, or by the Railway Board of the province.

The learned Judge of the Superior Court has found separately upon these two grounds of defence, and decided in favour of the plaintiff upon the first, and in favour of the defendant upon the second. By the judgment appealed against, it is, therefore, held that, while the contract did not constitute an undue advantage in freight rates, it nevertheless purported to agree upon rates which the defendant had not authority to agree upon

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with a shipper, because these rates had not been fixed by by-law of the railway company, as required by article 5172 R.S.Q. (1888).

For reasons which will presently appear, I would consider the two grounds of defence collectively rather than separately.

As it was the defendant who asserted that the contract was void upon stated grounds, it was for defendant to make proof of these grounds, or rather of the facts necessary to support them.

The defendant did, in fact, exhibit an order of the Lieutenant-Governor-in-Council of the seventh day of February, 1902, whereby a freight and passenger tariff, recited to have been passed by the defendant's directors on December 12, 1901, was sanctioned. Thereupon, evidence was put in, at the trial, tending to prove that the plaintiff's contract rates were lower than the tariff rates.

In this tariff, the rates mentioned are rates per car load, whereas, in the contract, the rates for carriage of deals and sawn lumber are rates per thousand feet B. M.

The witness who testified respecting the difference of rates proceeded upon the assumption that a car consisted of 10,000 feet B. M. That, however, was a faulty basis upon which to found comparisons, because it appears in the contract itself that each car was to be loaded with not less than 12,000 feet B. M., provided suitable cars would be furnished by the company. There is no definite proof of the capacity of the cars which were used.

It is further to be observed that the plaintiff contracted to do the work of loading and unloading the wood into the cars at sidings and mills and destination. The money value of this work was not proved.

The tariff of December 12, 1901, having been sanctioned by the Lieutenant-Governor-in-Council, after having been submitted by the officers of the company, must, I think, be taken as a tariff which had been only fixed by virtue of a by-law of the company.

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I take it that, seeing the sanction of the government, it is to be presumed, in favour of a person who dealt with the company, that it had been adopted, with the requisite formalities, by the company.

Authority for this conclusion is to be found in Lindley, Company Law (6th ed.), p. 219, cited in the appellant's factum. The decision in *The Montreal Light, Heat & Power Co.* v. *Robert*, Q.R. 15 K.B. 137, may also be referred to.

There having been a legally existing tariff of rates, the question comes to be whether the rates agreed upon with the plaintiff were rates which were agreed upon in violation of law, in that, being different from those of the approved tariff they are rates which were not established by by-law of the company.

To have this question answered in the affirmative, I consider that it was not sufficient for the defendant to prove merely that the sums mentioned in the contract as car-rates are less than the rates mentioned in the tariff, without shewing that the contract rates, added to the money value of the other burdens, assumed by plaintiff, of loading and unloading wood, and to the difference per thousand feet which there would have been, if the capacity of the cars had been greater than 12,000 feet, would have formed a total freight charge which would still have been less than the tariff rate.

I think that there is authority for this conclusion to be found in cases which have arisen under the Imperial Act, though it may be observed that, under that Act, in cases when undue preference is charged, the burden of proof is put upon the carrier.

The wording of the Imperial Act, "Railway and Canal Traffic Act" (1854), sec. 2, is: "And no such company shall make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

And by the Railway and Canal Traffic Act, 1888, it is enacted,

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in sec. 27, that "whenever it is shewn that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates or charges for the same or similar merchandise, or lower tolls, rates or charges for the same or similar services, than they charge to other traders, or to the traders in another district, or make any difference in treatment, in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference, shall lie on the railway company."

Under the operation of these provisions, it was held in *Holwell Iron Co. (Ltd.)* v. *Midland R.W. Co.*, [1909] 1 K.B. 486, that "when the inequality is the result of a fair and honest bargain, the consideration for which has been duly executed and enjoyed by the railway company, it is not an undue preference." It was added: "Such bargains, however, must be looked upon with suspicion, and, in case of such an agreement of modern date, with great suspicion."

It is laid down in the work of MacNamara, on Carriers (1909 ed.), in paragraph No. 294, that: "A railway company do not contravene sec. 2 of the Railway and Canal Traffic Act (1854), by carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee." *Nicholson et al.* v. *Great Western R.W. Co.*, 5 C.B.N.S. 366; *Ransome* v. *Eastern R.W. Co.*, 8 C.B.N.S. 709; *Daldy* v. *Midland R.W, Co.*, 10 Ry, & Ca. Tr. Cas. 303. See also *Stuck* v. *Swansea Canal Co.*, 16 C.B.N.S. 245.

"Any circumstance which makes it better worth the while of the company to carry the goods of one trader rather than those of another, may be taken into consideration under sec. 27 of the Railway and Canal Traffic Act, 1888. *Hickleton Main Colliery Company, Ltd.* v. *Hull, Barnsley and West Riding Junction Railway and Dock Company*, 12 Ry. & Ca. Tr. Cas. 63."

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It is true that these citations relate to cases of alleged undue preference, whereas the question now being considered is one of legal warrant for the rates charged. But, as I have shewn that as the question, which presents itself here, becomes reduced to the question whether the rates are, or are not, less than the rates of an existing and approved tariff, the authorities which I have cited are clearly admissible to shew that account has to be taken, not merely of the rates specifically mentioned, but also of the money value of the other burdens of the shipper, under the agreement which is attacked. I, therefore, conclude that it has not been proved that the rates charged to the plaintiff were, in money's worth, different from the tariff rates.

The defendant also pleaded failure on the part of the plaintiff to comply with his obligation to ship 3,500 carloads of wood per annum, but, apart from acquiescence for three years and failure to complain of short shipment, it appears to me that in computing the amount of the alleged shortage, the defendant bases its calculation on carloads of lumber only, without counting the carloads of pulpwood.

I would, therefore, reverse the judgment and maintain the plaintiff's claim.

It may be added that even if the defendant, as it contends, was without statutory right to enact payment of freight at the rates mentioned in the contract, I am not prepared to take the view that its undertaking to refund part of the sums so collected for freight, is not enforceable in law. There does not appear to be any good reason why it should not agree to restore money so received. *Friendly Society of Ironfounders* v. *Ingall*, 27 T.L.R. 321. That would not be giving effect to a contract prohibited by law.

Pentland, Stuart & Brodie, for the appellant.
Taschereau, Roy, Cannon & Parent, for the respondent.

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TOLLS—ADJUSTMENT.

CADWELL SAND AND GRAVEL CO. v. CANADIAN FREIGHT ASSOCIATION.

(File No. 19391.)

Board of Railway Commissioners. September 9, 1912.

1. CARRIERS (§ IV C 1—525)—REGULATION OF RATES—TOLLS — ADJUSTMENT—INCREASE — RESTRICTION.

It is a well-established principle of rate regulation that where a business has been built up relying upon a particualr rate adjustment, an increase in this rate adjustment should not be made without amply sufficient reasons.

2. CARRIERS (§ IV C 1—525)—REGULATION OF RATES — REASONABLENESS —RATE ON PRESSED BRICK — THROUGH RATE — INCREASE—PROPORTIONAL—FOREIGN AND CANADIAN CARRIERS.

The rate on pressed brick from Bradford, Pennsylvania to Windsor, Ontario, formerly $1.60 was increased to $2.00 per ton. Under the former rate the Grand Trunk received 88 cents as its proportion and the B.R. & P. (United States carrier) 72 cents. Under the new rate the Grand Trunk received an increase of 32 cents and the B.R. & P. of 8 cents. Upon complaint being made of the increase in rate, *held*, that in the absence of evidence shewing any increase of cost to justify the increase of 32 cents in the rate from Bradford to Windsor the 88 cent division of the through rate which formerly prevailed should be re-established by the Canadian carriers as a proportional limited to brick ex Bradford and Bradford points for furtherance.

[*Metropolitan Paving Brick Co.* v. *Ann Arbor Ry. Co.*, 17 I.C.C.R. 197. referred to.]

THE application was heard at Toronto, April 30, 1912.

H. D. Drake, for the Applicant.
C. A. Hayes, for the Respondent.

The facts are fully set out in the judgment of Mr. COMMISSIONER MCLEAN.

MR. COMMISSIONER MCLEAN:—Complaint was made on behalf of the Cadwell Sand and Gravel Company, by Mr. H. D. Drake, to the effect that where formerly the rate on pressed brick from Bradford, Pennsylvania, to Windsor, Ontario, was $1.60 per ton, the rate is now $2.00 per ton. Mr. Hayes, on behalf of the Canadian Freight Association, stated that the increase in the rate was the outcome of the re-adjustment of rates

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in the United States contingent upon a decision of the Interstate Commerce Commission in the *Metropolitan Paving Brick Company et al.* v. *Ann Arbor Railway Company et al.*, 17 I.C.C. 197. In this case in which various cognate applications were joined, the Interstate Commerce Commission decided in substance that there is no transportation reason for making different rates on different grades of fire, building, and paving brick. This decision was rendered on November 26th, 1909. Subsequently, the American railways re-aligned their rates on brick; the principle laid down as above by the Interstate Commerce Commission being accepted, and set forth in the phrase "a brick is a brick."

In the working out of the rates on brick it is stated that there were some reductions. These are not before us, and are not involved in the application. It is admitted that there were increases. The present application is concerned with one of these.

The Cadwell Sand and Gravel Company has built up a business in pressed brick from Bradford. This business has been developing during the past four or five years, during which Windsor receiver the same rate, viz., $1.60, as was quoted to Detroit. Effective April 20th, 1912, the B.R. & P. Railway Company put in its tariff, C.R.C. No. 547, the effect of which was to increase a rate to Windsor from $1.60 to $2.00. In this tariff the Grand Trunk and the Michigan Central are involved as carriers reaching Windsor.

This application is one of the many in which matters of international railway interests are involved. It is patent that the number of cases in which the through regulation of a rate involves dealing with the rate of both the American and the Canadian carrier will steadily increase with the steadily increasing inter-relation of the railway network of Canada and of the United States. In the present instance two of the lines of carriage between the Buffalo gateway and the Detroit gateway pass through Canada. Formerly Windsor had the same rate as Detroit. Now as the result of the rate re-adjustment the Windsor rate is 40 cents in excess of the Detroit rate. In justification of this difference it was stated by Mr. Hayes that Detroit was a meeting-place for brick for the competition of the bricks produced in Pennsylvania, and the bricks produced in Ohio, and that consequently, the rate for the brick from such a point as Bradford to Detroit was held down by the competition of the brick from Ohio.

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Under the rate of $1.60 existing before the introduction of this tariff, the Grand Trunk received as its proportion of the rate from Bradford to Windsor, 88 cents, thus leaving 72 cents to the United States carrier from Bradford to Buffalo. The distance from Bradford to Buffalo being some seventy-eight miles, the ton mile rate works out about .92 of one cent per ton per mile. Under the new rate of $2.00 to Windsor, the Grand Trunk in this instance receives $1.20 out of the rate; the result is that the Grand Trunk receives an increase of 32 cents in its proportion, while the B.R. & P. receives an increase of 8 cents in its proportion. The B.R. & P., under the new rate, has a ton mile of 1.02 cents, while the Grand Trunk receives a ton mile rate of .521 cents as compared with a former ton mile rate of .38 cents.

With the reasons which led to the re-arrangement of the brick rates in the United States the Board is not concerned, except in so far as they do or do not afford a justification for the increase of rates on the movement into Canada. With the proportion of the rate from Bradford to Buffalo the Board is not concerned since the B.R. & P. is not subject to the Board's jurisdiction. But while the Board has no jurisdiction over the B.R. & P., it has to recognize that with the concurrence of the Canadian carriers there has been an increase in the rate charged to the applicant during four or five years he has been engaged in business on the $1.60 rate. Now, there is an increase of 40 cents. So far as a portion of the increase is attributable to the increase in the proportion received by the B.R. & P., the Board has no jurisdiction. The carriers subject to the Board's jurisdiction, which participate in the haul from Buffalo to Windsor must, however, justify the increase in their proportion, an increase of 32 cents. It is a well-established principle of rate regulation that where a business has been built up relying upon a particular rate adjustment, an increase in this rate adjustment should not be made without amply sufficient reasons. While it must be recognized that the inter-relations between Canadian and American carriers create many difficult situations, and that in some re-adjustments at least the Canadian carriers may not be entirely free agents, what the Board must look to in the portion of the rate on an international shipment which is subject to its jurisdiction, is—is the increase justified by conditions of the haul subject to its jurisdiction. The Board has not been given evidence to shew that there is increase of cost of any kind which

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necessitates and warrants the increase of 32 cents before us, and in the absence of affirmative evidence that the increase is justifiable, the conclusion must be that the 88 cent division of the through rate which formerly prevailed should be re-established from Buffalo to Windsor by the Canadian railways as a proportional limited to brick ex Bradford and Bradford rate points for furtherance.

While the Board has no jurisdiction over the rate from Bradford to Buffalo, it is informed that the full local to Buffalo is 80 cents, which will enable a through rate of $1.68 to be built up. Further, the proportional from Buffalo to Windsor should be the maximum to direct line points. The tariff putting this into effect should be filed within forty-five days from the issuance of the Order making this judgment effective.

THE CHIEF COMMISSIONER and COMMISSIONER MILLS concurred.

CLASSIFICATION.

BERLINER GRAMOPHONE CO. v. CANADIAN FREIGHT ASSOCIATION.

(File No. 16453.1.)

Board of Railway Commissioners. April 11, 1912.

CARRIERS (§ IV C—525)—RAILWAY FREIGHT — CLASSIFICATION — C.L. RATING—GRAMOPHONES AND GRAPHOPHONES — "MUSICAL INSTRUMENTS.

Gramophones and graphophones should be classified with musical instruments and given a second class carload rating.

THE application was heard in Ottawa, April 18, 1911, and material was filed with the Board.

E. J. Walsh, for the Applicants.

John Pullen, for the Respondents.

The facts are fully set out in the judgment of Mr. Commissioner Mills.

Ottawa, April 11, 1912. MR. COMMISSIONER MILLS:—In re the application of the Berliner Gramophone Company, Limited, Montreal, for an order directing the railway companies subject to the jurisdiction of the Board, to add gramophones, boxed, to the "musical instruments" list in the Canadian freight classification ,it may be observed as follows:

The applicant company calls attention to the fact that these

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instruments are already provided for in the said classification, not as musical instruments, but under a separate heading, as "gramophones and graphophones," adding that "gramophones are analogous to music boxes and instruments similar to the "Regina" and small-sized "orchestrion," both of which are operated by perforated steel discs, which, in principle, are not unlike the flat composition disc known as the "record" in gramophones; and that piano parts, music boxes, drums, etc., are all embraced in the "musical instruments" list, while gramophones are excluded. Hence the application in this case.

The railway companies, through the Advisory Committee of the Canadian Freight Association, represented by its chairman, Mr. John Pullen, refused to grant the said application, mainly on two grounds:

1st. That the gramophone is not, strictly speaking, a musical instrument.

2nd. That gramophones are not shipped in carloads between points in Canada; that a carload rating is asked for, solely for the purpose of obtaining a classification which will permit the loading of these machines in the same car with musical instruments, and securing the advantage of the carload rating of second-class on what is properly a less than carload shipment, instead of the present first-class rating; and that, if granted, this would simply pave the way for similar applications for additions, not only to the "musical instruments" list, but also to other lists, resulting in the reduction of the carriers' revenues, without accomplishing any good purpose in so far as the ultimate consumer is concerned.

If a music box, operated by a spring, and the pianola, used to produce music by attachment to a piano, are musical instruments—and they are so classified by the freight association—it seems difficult to avoid the conclusion that the gramophone is also a musical instrument. In fact, it is, in my opinion, scarcely necessary to argue the question; for it is manifestly proper to name a thing from its chief function or most striking characteristic; and, while the gramophone reproduces all kinds of sounds, its chief function is to reproduce vocal, band, violin, and orchestral music. I think we may properly say that it is the most wonderful musical instrument ever invented; and I need only add that almost the only people who deal in gramophones, buying and selling them, are wholesale and retail dealers in musical instruments.

Admitting that gramophones are musical instruments, we are unable to give any good reason for excluding them from the

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"musical instruments" list in the freight classification. It is true that hitherto they have not been shipped in carloads between points in Canada—for the simple reason that there has been no carload rating for them. The rate on carloads and on less-than-carload lots being the same, there is nothing to be gained by shipping in carloads; and it should not be forgotten that there are now in the "musical instruments" list several instruments which are never, or scarcely ever, shipped in carloads between points in Canada—music boxes, violins, and drums, for instance.

The chief traffic officer of the Board, in his report on this case, quotes from a compromise agreement entered into December, 1905, by the railway companies and a representative of "The Canadian Manufacturers' Association," as follows:

> The Canadian Manufacturers' Association withdrew their application for the open or unrestricted mixing of commodities, in carloads, at the highest rating, to and between points west of Port Arthur, as in effect in the territory east of Port Arthur, in consideration of the railway meeting the needs of the situation by providing for the special cases brought before them, and in view of their expressed willingness to give equal consideration to any similar cases which may arise in the future.

And he adds that—

> In these various trade lists scores of articles that do not move in carloads are, nevertheless, given carload ratings, that they may be shipped as items of mixed carloads, and for no other purpose.

It is no doubt true, as stated by Mr. Pullen, that there are defects and anomalies in the classification; but it should be borne in mind that the trade-list system (the grouping of commodities with a view to shipping in mixed carloads) was voluntarily introduced by the railway companies—no doubt after careful consideration; and as long as it continues so important a part of the classification, I am unable to see how the companies can refuse to make reasonable additions to the lists, without leaving themselves open to charges of discrimination and violation of the underlined portion of the agreement quoted above.

On a gramophone weighing 300 lbs. gross, the freight from Montreal to Calgary is $9.57 under the present less-than-carload (L.C.L.) rating, and $8.04 under the carload (C.L.) rating asked for. To Revelstoke the figures are respectively $11.34 and $9.51. The difference on a single instrument is not very much; but it may amount to a considerable sum in the aggregate.

The gramophones in question are sold f.o.b. at the factory; so the parties directly affected by the freight rates are the job-

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ber, the retailer, or the consumer—or all three; and I fail to see why a change in the rating is not as likely to benefit or injure "the ultimate consumer" in the case of gramophones as in the case of hundreds of other commodities of which the freight on a single article is a comparatively small amount.

Further, it does not necessarily follow that a railway company secures less net revenue from carload than from less-than-carload shipments of goods.

The carload rate is nearly always less per 100 lbs. than the rate on less-than-carload lots; but, in the case of a carload, no freight-shed accommodation is required either at the initial point or at destination; the shipper does the loading at his own expense; the consignee generally does the unloading at his expense; the railway company is paid for a full capacity carload, whether the car is filled, half filled, or third filled; the car is simply hauled from one point to another fixed point, involving little or no outlay in transit similar to the heavy expense incurred by the frequent shunting of the same car and the handling (loading and unloading) of L.C.L. way-freight; and the loss to the company from breakage or other damage to goods is comparatively little, because the shipper (a directly interested party) does the arranging, packing, and staying of his goods in the car, and the consignee, another directly interested party, generally does the unloading.

In the case of less-than-carload shipments, the railway company frequently bears a part of the cartage charges for collecting and delivering the goods; the company has to provide freight-shed accommodation, and it does the loading and unloading at its own expense; the car is rarely filled—in fact it often goes half empty for a considerable part of the way, while the company is paid only for the actual weight carried: the company has to bear the expense of frequent stopping and shunting at stations, and the loss to the company from breakage and other damage to goods in transit is relatively heavy—(1) because cars carrying L.C.L. traffic have to be frequently stopped and shunted; (2) on account of hurried loading and unloading at stations; and (3) as a result of the goods being hurriedly dumped into a car with other goods therein, and left to slide about and be broken or otherwise damaged by the well-known slamming and banging of freight cars in coupling, starting, and stopping, especially in the hurried movements necessary in shunting.

The application in this case is supported by the Canadian Manufacturers' Association: it is also supported by jobbers in

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Ontario and in the Western Provinces; and my opinion, concurred in by the chief traffic officer of the Board, is that the said application is a reasonable one and should be granted—that gramophones and graphophones (under their various styles and names), gramophone and graphophone records, phonographs and phonograph cylinders, boxed, should be added to the "musical instruments" list and be given a second-class carload rating in the Canadian freight classification.

MR. COMMISSIONER MCLEAN (dissenting):—So far as the Canadian Freight Association objects to the amendment of the classification asked for on the ground that gramophones are not musical instruments and therefore should not be included in the musical instrument list, I think that nothing of any importance depends on this. Gramophones are as musical as a great many other instruments which are apparently recognized as musical instruments. What the Board is concerned with is not the mere abstract question of the logic of classification. I have devoted some time to the study of different classifications, and have not yet been able to work out an inclusive logical principle on which they are based. Mr. Walsh has put the position of the applicants succinctly when he says if the instrument is a musical instrument it is entitled to the same treatment as all other items on the musical instrument list. But is this the only question?

Mr. Chilvers frankly stated that the application, if successful, would only be of indirect advantage to his company. The goods are handled by jobbers. The chief jobbers who deal in these instruments are located in Halifax, St. John, Quebec, Montreal, Ottawa, Toronto, Port Arthur, Fort William, Winnipeg, Calgary, Regina, Edmonton, Vancouver and Victoria. He stated that he had taken the matter up on the application to him of various jobbers. He further undertook to send in copies of the various applications which he had received from these jobbers, and which led to the present application. While a few letters have been received, it so happens that Mr. Chilvers is not able to supply all the material which he promised. The reason for this is readily apparent. On account of the illness of Mr. Chilvers it has not been possible for him to take the matter up until recently. The case has been standing for this information. In the meantime it being the practice of his company to clear its files from time to time, so that these files may not be unnecessarily loaded up with correspondence, a considerable part of the correspondence which he promised has been destroyed.

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The jobbers being in reality the persons interested, their position as developed in the correspondence on file is of importance. In a letter written on August 8th, 1911, Walter F. Evans and Company of Vancouver stated that in November, 1909, they had been compelled to ask the Berliner Gramophone Company to permit them to raise the retail price of the Victor Victrola XVI owing to the high freight rate which existed. Three letters from the Mason and Risch Company of Toronto, under date of May 29th, May 30th and August 4th, 1911, are on file. The first of these devotes itself to the inconsistency of the classification as it at present exists. It is claimed that it is a very great injustice that at the present time carload shipments can be made up consisting of pianos, organs, cabinet players, stools and benches, while at the same time the dealers are debarred from enclosing musical instruments such as gramophones. The same position is developed in the other two letters referred to.

It would appear then that the two features to be dealt with are the question of the alleged inconsistency of the classification, and the question of rates. I do not consider it necessary to devote time to the inconsistency of the classification. The classification is inconsistent in this, and in many other respects, and life is too short to engage in the correction of the classification on purely abstract grounds. The matter which is fundamental in this application is that of the rate, and of the circumstances connected therewith.

While the applicant company did not directly challenge the rate, the most important reason given in the letter of the Evans Company is the burden of the rate. In this letter reference was made to the fact that this company found it necessary to apply to the Berliner Company for permission to raise the sale price of the instrument. It was stated by Mr. Chilvers in his letter of March 24th, 1911, that "we are obliged to allow our dealers to advance the price of the largest of the Victrola types of instruments from $240 to $250." While Mr. Chilvers said that they gave the dealers the privilege of advancing, which they unanimously accepted, it points to the fact which was more definitely developed later on, that the company has entire control over the selling price of the instruments. In answer to a question he testified that the retail price of the instrument was controlled entirely by his company. When asked what his company would do if one of the dealers cut the price named, Mr. Chilvers replied, "we cut him off our list; we won't supply him." It may further

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be noted that while the increase of $10 was stated to be made on account of the burden of freight rates, the only points from which we have any allegations as to the burden of freight rates are in British Columbia. At the same time the increase of $10 applied generally on this type of instrument as sold at the different jobbing points regardless of the distance from the initial point of distribution by the Berliner Company, and so far as the Board is informed, without any computation based upon the pressure of freight rates at these points. Certainly if the $10 increase was necessitated at Vancouver on account of the pressure of freight rates, it would follow that such increase being made general would, in various instances, simply mean an additional profit to those handling the instrument.

The Board is constantly told, in connection with applications made to it for revision of freight rates, that if a reduction is ordered it will result in the consumer receiving the article at a lower price. The consumer certainly should participate in the advantage flowing from the reduction by the Board of rates on the ground that they are unreasonable. But to the consumer—who deserves a consideration he does not always receive since he is the end of the distributive process, and the silent partner in it—the advantage of the rate reduction filters slowly, and I am satisfied that in many instances the advantages legitimately flowing from rate reduction never reach him.

The function of the Board is not to ensure the shipper or producer profits on his commodity. The factors affecting production and distribution at a profit are many and diversified. The rate factor, which is one of them, is the only one with which the Board is concerned. If the Board finds the rate unreasonable it is its duty to direct a proper reduction. But in so reducing it it is not to be assumed that the inability of a producer or shipper to compete in a given market in every instance measures the proper rate reduction. Rate reduction, in so far as the rate is found to be unreasonable, is the duty of the Board, and the right of the producer or shipper. But it is only in so far as the rate is unreasonable and not as the insurer of business profit, that the Board has authority to interfere. It follows that it is not within the scope of the Board's functions to readjust the balance of profit between the shippers or producers and the railway. Its intervention, it is true, may, by directing rate reduction, affect this balance; but its action is concerned with the particular facts affecting the reasonableness of the particular rate or rates.

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In the present application the Board is confronted with a situation in which the retail price of the article produced is entirely controlled by the producing company. The price is uniform regardless of local conditions, length of haul, or freight charges. The price cannot be increased without the permission of the Berliner Company, and if the price is reduced by a dealer, the penalty is that the dealer will no longer be permitted to carry the instruments in question. It is not within the scope of the Board's jurisdiction to pass any opinion upon the legitimacy of the arrangement above outlined. It is justifiable to recognize the fact.

It would appear upon the facts of the application before the Board that it is in essence simply a question of readjusting profits between the railway and the producer, jobbers, and retailers concerned, and that the consumer in no way stands to gain from any change in the situation. It has not been established that the rates are unreasonable, and I am therefore of the opinion that a case has not been made out for the interference of the Board.

Ottawa, May 7, 1912. THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT):—This application for the classification of gramophones and graphophones with "musical instruments" in the Canadian freight classification was heard by my brother Commissioners, Dr. Mills and Commissioner McLean, at a sittings on the 18th April, 1911. The matter was allowed to stand for some time to give the applicants an opportunity of putting in some further information.

The file now comes to me with a memorandum from Dr. Mills, dated April 11th, 1912, recommending that the application be granted, and a memorandum from Commissioner McLean, dated April 22nd, 1912, expressing the opinion that a case has not been made out for the interference of the Board. I have read these, and have also read the report of the chief traffic officer of the Board of the 28th March, 1912.

As my brother Commissioners who heard this matter do not agree, it is incumbent upon me to decide the matter. It appears to me to be a question of classification only. My view is, that gramophones and graphophones are quite as much musical instruments as music boxes, which the railway companies have voluntarily placed in this classification. I therefore concur with Dr. Mills in the granting of the application.

Application granted.

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EXPRESS COMPANIES.

SHIPPERS BY EXPRESS v. CANADIAN NORTHERN EXPRESS CO. AND CENTRAL ONTARIO RAILWAY CO.

(File No. 4214.215.)

Board of Railway Commissioners. April 17th, 1912.

1. CARRIERS (§ IV C 1—525)—LATITUDE IN REGULATING RATES — BOARD—EXPRESS TOLLS OVER TWO OR MORE LINES—SUM OF THE LOCALS.

Traffic handled by two or more companies over connecting lines may well bear a heavier toll than if handled by one only and where two companies charged tolls equal to the sum of the locals over their respective lines, the Board refused to interfere in the absence of proof that the charges were excessive, notwithstanding that a lower through rate had formerly been charged when one express company operated over both lines.

2. CARRIERS (§ IV E—562)—POWER OF RAILWAY COMMISSION—EXPRESS COMPANIES—EXCLUSIVE OPERATION.

The Board cannot compel an express company to operate and compete over the line of a railway from which it has withdrawn by reason of the acquirement of the line by a railway operating an express service through its allied express company.

[*Continental, Prairie and Winnipeg Oil Cos.* v. *Canadian Pacific et al. R. Cos.*, 13 Can. Ry. Cas. 156, followed.]

THE application was heard at Ottawa, April 16, 1912.

Mr. W. H. Burr, for the Express Companies.

Hon. Mr. Phippen, for the Canadian Northern Ontario Railway Company.

The facts are fully set out in the judgment of the Chief Commissioner.

April 17, 1912. THE CHIEF COMMISSIONER (Hon. Mr. Mabee):—For many years the Dominion and Canadian Express Companies have both operated over the lines of the Central Ontario Railway, and this gave the towns and villages along that line exceptional advantages, in that they had access to all points reached by these two companies without the disadvantages that exclusive offices labour under. Recently, the Canadian Northern Railway Company acquired the Central Ontario Railway, and has furnished express service through the medium of the Canadian Northern Express Company, the Dominion and Canadian Express Companies withdrawing. This put the towns along that line of Railway at the disadvantage of being exclusive offices of the

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Canadian Northern Express Company, and express traffic passing to and from the offices of the Canadian Northern Company upon this line of railway, and exclusive offices of the Dominion and Canadian Companies, now carries the sum of the locals, instead of enjoying the through rate of one Company.

It was explained at the hearing that the Express Companies are now engaged in framing tariffs establishing joint through rates to and from all points in Canada; but as the amount of work done involved is very large, it may be some time before these can be made effective.

A concrete example will shew how traffic is affected.

Under the former system a shipment of poultry from Picton to Ottawa of 185 lbs. carried a charge of $1.48. Now, by reason of this shipment being handled by the Canadian Northern Express Company to Trenton, and by the Canadian Express Company from Trenton to Ottawa, the charges are $2.22, or an increase of 50 per cent. This arises by combining the local from Picton to Trenton, and the local from that point to Ottawa, as against the former single through rate between Picton and Ottawa.

It has been held both here and in the United States that traffic handled by two or more companies could well bear a heavier toll than when handled by one only, there being extra expense in transferring, way-billing, and the like; and the only thing the Board can do is to see that the joint express tariffs, when ready for submission, contain reasonable and proper reductions from the sum of the locals. We cannot compel the Dominion and Canadian Express Companies to operate over the line of the Central Ontario Railway Company. The people along that line enjoy the same express facilities that other towns, where only one express company operates, enjoy; except that, as the Canadian Northern Express Company has as yet but few offices in Ontario, there will, in the meantime, be more exclusive offices against these points than formerly; but as the Canadian Northern Railway Company extends its lines, this difficulty will gradually disappear. The above illustration of the shipment of poultry from Picton to Ottawa will be cured in a few months; when the Canadian Northern Railway Company completes its connection here, the old rate of the one company will at once become effective again.

The acquisition of the Central Ontario Railway Company by the Canadian Northern Railway Company was perfectly legal;

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the latter company was entirely within its rights in establishing express service through its allied express company, and this necessarily compelled the other two express companies to withdraw from the field. This is a condition we cannot control. No hardship results so long as the new tolls are not excessive. The people along the line in question are naturally in a complaining mood; but they have for years enjoyed better facilities than are afforded at most places of greater size, and in a short time will be on a par with most other points outside of the larger cities.

THE ASSISTANT CHIEF COMMISSIONER and MR. COMISSIONER MCLEAN concurred.

HIGHWAY CROSSED BY RAILWAY.

CITY OF OTTAWA v. GRAND TRUNK RY. CO.

(Files Nos. 19344, 19344.1.)

Board of Railway Commissioners. June 4, 1912.

1. RAILWAYS (§ II B—15)—CROSSINGS—HIGHWAY CROSSED BY RAILWAY—WANT OF AUTHORITY—MAINTENANCE OF TRACK LEGALIZED—PROTECTION AT CROSSING—RAILWAY ACT, 1888, SEC. 187—RAILWAY ACT, SECS. 222, 237—9 & 10 EDW. VII. CH. 50, SEC. 59A

Upon an application to direct the removal of the respondent's track from a public highway, and by the respondent to legalize its maintenance under sections 59A, 222, and 237 of the Railway Act, the Board granted the respondent's application upon condition that upon the construction of a street railway upon the highway, diamond crossings should be installed and sufficient protection given at the crossing at the respondents' expense and that the movement of the steam railway upon the highway should be restricted.

THE application was heard at Ottawa, June 4, 1912.

F. H. Chrysler, K.C., for the Applicant.
W. H. Biggar, K.C., for the Respondent.

The facts are fully set out in the judgment of the Assistant Chief Commissioner, delivered at the close of the hearing.

ASSISTANT CHIEF COMMISSIONER:—With regard to these two matters, that is, Nos. 1 and 2, first, the application of the City to have this Grand Trunk track removed, and, second, the ap-

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plication of the Grand Trunk Railway Company for power to maintain tracks into the Export Lumber Company's property.

We are of the opinion that the Grand Trunk spur is not legally across Preston street. Under the Railway Act, at the time the track was laid down, while the railway company may have had power to build a quarter mile section without leave from anybody, still that power was subject to the provisions of the Act with regard to the crossing of highways, and under section 187, which I referred to a moment ago, the railway company had no right to cross a highway with its tracks without first submitting a plan to the Railway Committee of the Privy Council, and it is admitted they did not do that. Therefore, they are not legally on the highway.

The city of Ottawa says that they are trying to induce the street railway to build on Preston street, and the street railway has consented to do so, provided it is not put to the expense of crossing and protection of the spur track into the Export Lumber Company's property.

We will grant the application of the Grand Trunk to legalize this track on the condition that, when the street railway is built on Preston street, the Grand Trunk be at the expense of putting in the diamonds on the tracks, and that the movements on the steam railway be limited to the time consented to by Mr. Dewar on behalf of the lumber company, that is, from 12 midnight to 5 a.m. When these movements are taking place the steam railway will have to be flagged across Preston street. A flagman will have to be stationed by the steam road on Preston street to prevent street cars, pedestrian or vehicular traffic from crossing during the time that the steam cars are approaching or passing.

No derails or semaphores will be required now. They may be required at some future time if the thing develops more, when that further protection will have to be ordered, but that flagging will be sufficient for the present.

I understand there are gates now on the steam railway right-of-way shutting off the entrance from Preston street into the yard of the Export Lumber Company. Those gates should be maintained. The gates at each side of the highway crossing the steam tracks should be maintained by the Grand Trunk Railway. These gates to be kept closed at all times except when a movement on the steam track is to cross the highway.

That will dispose of No. 1; it will be dismissed.

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Then, No. 2 will be granted with the conditions I have stated.

Mr. Chrysler:—There is just one point that has not been mentioned to the Board. A source of danger which has occurred to me is the rail on the west side of Preston street, which would, if any negligence occurred on the part of the railway company in allowing cars to stand, allow a runaway car to run down the grade, and perhaps lodge on Preston street. I think there should be some provisions made for blocking that track when it is not in use. I think that could be done so the car could be stopped.

THE ASSISTANT CHIEF COMMISSIONER:—Cars running down from the west?

Mr. Chrysler:—Yes. I think from the east side it is a level grade; there is no danger of a car running away there, but coming on Preston street from the west there is a grade.

THE ASSISTANT CHIEF COMMISSIONER:—Do they leave cars between the Grand Trunk Railway on Preston street on that piece of track?

Mr. Chrysler:—I do not know as to the practice.

THE ASSISTANT CHIEF COMMISSIONER:—How is that, Mr. Donaldson?

Mr. Donaldson:—We are not doing it at present. It might be necessary for the convenience of manufactories.

THE ASSISTANT CHIEF COMMISSIONER:—Is there a grade there?

Mr. Donaldson:—There is a falling grade there.

THE ASSISTANT CHIEF COMMISSIONER:—I suppose it would be safe practice that there should be some block there?

Mr. Donaldson:—That could be easily put up by what we call a turnout switch.

Mr. Mountain:—A cut rail.

THE ASSISTANT CHIEF COMMISSIONER:—If the railway company at any time leave cars there, they shall instal this turnout switch to make it physically impossible for a car to reach Preston street.

Mr. Biggar:—Mr. Chairman, with regard to the hours limited for switching, I understand from Mr. Donaldson that it will make it practically impossible for us to operate the siding. Those hours may suit the lumber company, but they do not suit us, according to Mr. Donaldson, and if the crossing is going to be protected as you suggest, why limit us from 12 midnight to 5 in the morning?

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THE ASSISTANT CHIEF COMMISSIONER:—It was a question of putting in more expensive protection, I mean derails, semaphores, and interlocking devices.

Mr. Donaldson:—That might develop, but in the meantime I do not think there is any probability of our using that siding more than once a day. We would like to leave that open because, in future, manufacturing, and other interests, might arise there, and be very valuable to us.

THE ASSISTANT CHIEF COMMISSIONER:—If you want to come along there in the middle of the day with trains, you will have to protect the crossing with an interlocking plant. We thought you would not want to operate then; that is why we left it so easy. If there is going to be no time limit, to prevent any chance of accidents there to street cars, we will have to have an interlocking device.

JURISDICTION.

DOMINION SUGAR CO. v. CANADIAN FREIGHT ASSOCIATION.

(File No. 18568.)

Board of Railway Commissioners for Canada, February 1, 1912.

1. CARRIERS (§ IV A—519)—BOARD—JURISDICTION — TOLLS — REFINING-IN-TRANSIT.

   The Board has no jurisdiction to regulate refining-in-transit rates except when such rates discriminate unjustly in favour of one point against another.

2. CARRIERS (§ IV B—520)—TOLLS AND RATES—UNJUST DISCRIMINATION —GEOGRAPHICAL ADVANTAGE—FOREIGN RAIL ROUTES.

   In considering geographical advantage as an element in rate regulation the Board must recognize existing rail conditions in Canada as it finds them, and as, *e.g.*, Wallaceburg and Montreal are practically equi-distant from Winnipeg by rail routes within Canada, Wallaceburg is not entitled to a lower rate than Montreal by reason of geographical advantage though over foreign roads its distance from Winnipeg is much shorter.

3. CARRIERS (§ IV A—519)—BOARD — JURISDICTION — TOLLS AND RATES —INTERNATIONAL TRAFFIC.

   The Board has no jurisdiction to regulate an international rate except in so far as the haul within Canada is concerned.

4. CARRIERS (§ IV C 3—535)—TOLLS AND RATES—REASONABLENESS — INCREASE OF PREVIOUSLY EXISTING RATES—ONUS.

   Where special circumstances have operated for a time, *e.g.*, effective water competition, to induce a carrier to give a low rate, the burden of disproving unreasonableness is not necessarily upon the carrier when the rate is subsequently increased.

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5. CARRIERS (§ IV C 3—535)—TOLLS AND RATES—RELATION OF RATES ON RAW MATERIAL AND FINISHED PRODUCT—EQUALIZING COST OF PRODUCTION AT VARIOUS POINTS.

Carriers are not required to adjust their rates (apart from the general question of reasonableness) in such manner as to equalize cost of manufacturing production in different sections; nor is it necessary that rates on raw material and finished product should be so related as to tend to that result.

6. CARRIERS (§ IV C 4—542*a*)—COMPETITION—FOREIGN ROAD—TOLLS AND RATES—REASONABLENESS.

A carrier is not obliged to meet a lower rate made by a competing foreign road and failure to meet it is not necessarily evidence of the unreasonableness of the higher rate.

[*Davy* v. *Niagara, St. Catherines and Toronto and Michigan Central Ry. Cos.*, 12 Can. Ry. Cas. 61; *Dominion Millers' Association* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 12 Can. Ry. Cas. 363; *Canadian Portland Cement Co.* v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211; *British Columbia Sugar Refining Co.* v. *Canadian Pacific Ry. Co.*, 10 Can. Ry. Cas. 159, followed.]

MR. COMMISSIONER MCLEAN:—The application as launched has two phases: (1) the matter of the refining-in-transit rate at Wallaceburg, and (2) the rate basis from Wallaceburg to Winnipeg.

The refining-in-transit privilege was not pressed at the hearing. It was, however, included in the original application, and it has also been subsequently referred to in a letter dated January 23rd, 1912, in which Mr. D. A. Gordon, General Manager of the Dominion Sugar Company, lays stress on the importance to his company of the refining-in-transit rate. The Board has no power to order the installation of a milling, or what is analogous, a refining-in transit rate. This is a matter which lies within the discretion of the railway. The only way in which the Board has any jurisdiction in the matter is where it is alleged that the milling-in-transit rate as installed discriminates against some other point.

The consideration of the attack upon the existing rate basis requires some attention to be given to the geographical situation of Wallaceburg, since it is contended that the existing rate basis does not take due cognizance of the geographical advantages possessed by Wallaceburg. Wallaceburg is located 542 miles west of Montreal. At present, the rate on refined sugar from Montreal to Winnipeg over the Canadian lines is the same as from Wallaceburg to Winnipeg, viz., 71 cents per hundred pounds in carlots. When the short line rail mileages are taken,

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it appears that from Montreal to Winnipeg is 1,420 miles, while from Wallaceburg to Winnipeg is 1,429 miles. By way of lines through the territory of the United States, the distance by way of Sarnia, Manitowoc, and Duluth to Winnipeg is 1,028, which is made up as follows:—

Pere Marquette to Manitowoc .....319 miles
Soo line to Duluth .....331 "
Duluth, Missabe & Northern and Canadian Northern to Winnipeg .....378 "

On shipments to points in the Northwest, the Canadian lines blanket the territory from Montreal to the Detroit and St. Clair rivers. In the course of the hearing, reference was made to the fact that there is an exception in regard to the rates on salt which was taken out from the blanket rate. This was the only exception referred to at the hearing, and no other exception has appeared after the tariffs have been checked. It is, therefore, an established practice to give over a territory extending over 500 miles west from Montreal a blanket rate to points in the Canadian Northwest.

As has been indicated, Wallaceburg is 542 miles west of Montreal. Furthermore, it is by rail connections through United States territory 392 miles nearer Winnipeg than is Montreal. As to the allegation that Wallaceburg has certain geographical advantages, it is apparent that in regard to its proximity to the lakes, as well as to its mileage through the United States to Winnipeg, it does possess certain geographical advantages. Without developing the point, it may be recognized that in respect of water-borne transportation and the competition arising in connection therewith; Montreal also has geographical advantages. As, however, Montreal was not heard in the present case, it is unnecessary to attempt to estimate the comparative value of the water advantages possessed by the two points.

In so far as the advantage of rail situation is concerned, the Board must take cognizance not only of the rail mileage through United States territory, but also of the actual route which must be traversed by rail in Canada. The Board must recognize the existing rail conditions in Canada as it finds them, and it therefore appears that while Wallaceburg is over 500 miles west of Montreal, it is as a matter of fact 9 miles farther from Winnipeg by the Canadian route than is Montreal. For all practical purposes, they may from the standpoint of Canadian railway mileage be regarded as equi-distant from Winnipeg.

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The Canadian mileages being substantially the same from both points to Winnipeg, it results that the Montreal-Winnipeg ton-mile rate is one cent, while the Wallaceburg-Winnipeg ton-mile rate is .998 cents.

The crux of the application as to rates from Wallaceburg is that during a portion of 1909 and 1910 there were in existence by way of the Pere Marquette and Michigan Central 60-cent rates to Winnipeg, while at the same time the 71-cent rate did and does apply by the Canadian lines to Winnipeg. Taking Winnipeg as a representative point, the situation was as follows:—

Pere Marquette R.R. tariff C.R.C. No. 1106, effective December 1st, 1909, published a commodity rate of 20 cents per 100 pounds Wallaceburg, Ont., to Duluth, Minn., which had the effect in connection with the current fifth-class tariff rate of 40 cents per 100 pounds beyond Duluth of establishing a through rate, Wallaceburg to Winnipeg, of 60 cents per 100 pounds. On December 20th, 1909, this tariff was amended by Supplement No. 9 to P.M.R.R. tariff C.R.C. No. 940. Under this supplement, a through rate of 60 cents to Winnipeg was quoted. This tariff was taken out by the P.M.R.R. Supplement No. 14 to tariff C.R.C. No. 940, effective April 20th, 1910, which had the effect of withdrawing all rates lower than the regular fifth-class basis. The situation as to the Michigan Central Railway is that M.C.R.R. Supplement No. 9 to tariff C.R.C. No. 1220 was published, effective February 15th, 1910. This established in connection with the Chatham, Wallaceburg & Lake Erie Railway, the same through rates as were then in effect via the Pere Marquette, the route being either via Duluth or via Minnesota Transfer and Duluth. These rates were withdrawn by M.C.R.R. tariff C.R.C. No. 1599, effective June 20th, 1910.

The Board is now asked for an order directing the establishment of the 60-cent rate. While the application, as launched, was apparently of wider scope, it was admitted by counsel for the applicant that the claim was limited to the Pere Marquette and Michigan Central. For it was recognized as an established principle that while such a lower rate had been established, it was in the discretion of the competing Canadian lines whether they should meet this lower rate or not, whether such lower rate was attributable to shorter mileage or any other cause. It may be noted that on February 1st, 1910, the British Columbia Sugar Refining Company complained to the Board that the 60-cent

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rate interfered with the existing rate adjustment, and should therefore be made applicable to the movement from Vancouver eastbound. In dealing with this contention, a memorandum of the Board, issued February 23rd, 1910, said:—

"It is entirely in the discretion of the Canadian Pacific Railway whether it shall meet on the movement of sugar from Vancouver to Winnipeg and other points mentioned in complaint, the rates introduced by the Pere Marquette from Wallaceburg to same points, and the parties should be so advised."

This principle does not relieve the railway with the higher rate from an attack on its rates as unreasonable; but the fact that it does not reduce its rates to meet the rates of its competitor does not afford any essential evidence of unreasonableness of the rates which it is charging.

It was contended by counsel for the applicant that the fact that the Pere Marquette and Michigan Central had maintained 60-cent rates for some period of time was evidence of these rates being reasonable, and that the burden was on them to justify the 71-cent rate which had been in existence prior to the reduction spoken of and which is now in operation as the result of this rate having been taken out. This, in general, is an accepted canon of rate regulation, although it must at the same time be recognized that special circumstances may have to be considered. For example, if a low rate basis continuing over some period of time were the outcome of an especially effective water competition, it would not necessarily follow that, when this water competition was removed, the placing of a rail rate on a higher basis would mean that the railway would have to bear the onus of disproof. But whatever may be the general situation as to rates on the movement within Canada, it must be recognized that the situation is different here. The railways participating in the rate have been indicated above. The 60-cent rate was built up by adding to the 5th class rate of 40 cents applying from Duluth, as well as from Fort William, to points beyond, a commodity rate of 20 cents. It appears that in the first instance the Pere Marquette did not quote an inclusive through rate, but that the rate was made up as a combination through rate. It is represented that the Pere Marquette endeavoured to have its connections beyond Duluth accept a shrinkage in their proportion of the through rate, but that they refused to do this and that they received throughout the 40-cent rate which is at present received. The 40-cent rate from Duluth is not attacked. If it

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were attacked, it does not appear how the Board would have jurisdiction to deal with a rate from a point in the United States to a point in Canada. The essence of the complaint is an application to have the existing 31-cent rate to Duluth replaced by a 20-cent rate to Duluth. The Board has no jurisdiction to do this. In *Davy* v. *Niagara, St. Catharines and Toronto Ry. Co. and the Michigan Central R. Co.*, a somewhat analogous state of facts was before the Board in connection with the question of pulp rates from Thorold to Suspension Bridge, N.Y. The Board disallowed a 3-cent rate which had been put in and ordered the re-establishment of the 2-cent rate which had hitherto existed. On subsequent consideration of the matter by the Board, it was held that this being a matter of an international rate was one which fell within the jurisdiction of the Board only in so far as the haul within Canadian territory was concerned.

It is alleged that the 20-cent rate was taken out because of pressure brought to bear by the Canadian railways. Whether this is so or not is not established. The Chatham, Wallaceburg and Lake Erie Railway which participated in the rate is willing to re-establish it. No statement on this matter was made by either the Pere Marquette or the Michigan Central. But the crucial question is one of jurisdiction and this the Board does not possess.

In the argument of counsel for the applicant, the question of the rates on raw sugar was imported into the discussion, and as this ancillary phase of the question, while not presented in the original application, was regarded as material to the presentation before the Board, some analysis of the situation must be made. The raw sugar used at Wallaceburg is obtained, so far as imports are concerned, from Austria, Belgium, and the British West Indies. About 20 per cent of the raw sugar used at this point is obtained from local grown beet root. It was stated by counsel for the applicant that practically 80 per cent of the raw sugar used in refined sugars that are shipped west is brought in via the Atlantic seaboard, and that this arrives at Montreal coming in by water. At the same time, it was stated by the railways that from 52 per cent, to 62 per cent. of the raw sugar is brought into Montreal by rail. To what extent water transportation is available in the carriage of raw sugar to Wallaceburg was not developed. It is alleged by the railways in a letter submitted by the chairman of the Canadian Freight Association, under date of January 23rd, 1912, that during the

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season of navigation raw sugar moved from Montreal to Wallaceburg via an all-water route. It is not necessary to lay any especial stress upon this, because it is not presented in such a way as to enable one to estimate the importance of the water transportation as a factor in the movement to Wallaceburg.

It is alleged that Wallaceburg is not on a proper rate basis for raw sugar as compared with Montreal. Raw sugar may be imported via Montreal from Halifax and St. John by rail. There is also the question of the water movement by Montreal. It is also imported via the ports of Portland, Boston, New York, and Philadelphia. For purposes of comparison, Halifax and New York may be taken. In connection with the New York rates, there was some question as to the actual rates. In arriving at the net rate, the cost of lighterage must be considered. Tariff references give the following rates from New York:—

From New York, N.Y., To—	Exclusive Lighterage Cts. 100 lbs.	Inclusive Lighterage 3 Cts., 100 lbs.
Wallaceburg, Ont.—		
N.D.-G.E. Supp. 88, C.R.C. 10.....		15
Montreal, Que.—		
N.D.-G.E. Supp. 88, C.R.C. 10.....	11	14
N.Y.C.A.-19885, C.R.C. 1944.....	12*	15
(Via Huntingdon and G.T.Ry.).....		
West Shore R.R. A-6933, C.R.C. 513....	12†	15
(Via Huntingdon and G.T.Ry.)		

* Tariff states rate applies on Sugar F.O.B., N.Y.C. & H.R.R. Pier at 60th Street.
† Tariff states rate applies on Sugar F.O.B., West Shore R.R. Pier at Weehawken, N. J.

A summary statement for New York and Halifax follows:—

Rate		Miles	Rates per ton per mile
11c	New York—Montreal	385	.0057
12c	" " —Wallaceburg.....	649	.0037
11c	Halifax —Montreal.....	837	.0026
14c	" —Wallaceburg.....	1370	.0020

It being stated by counsel for applicant that "as a matter of fact the raw sugars that are used in Wallaceburg come in via

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the New York gateway," it follows that it is the respective positions of Montreal and Wallaceburg to New York in respect of raw sugar he has in mind in complaining of a disparity in rates.

In developing his position, counsel for applicant said in substance he desired to average up the total of the raw sugar rates in and the refined sugar rates out. He contended that it was unfair to blanket the refined sugar unless the raw sugar was also blanketed. Coupled with his references to the position said to exist as to water-borne transportation of raw sugar into Montreal, it would appear that this is a contention that aside from any question of the reasonableness of the rates railways are required through reduction of rates to place manufacturers situated in different sections of the country on an even keel as to costs of production. But the Board has already held that this position is untenable: *Canadian Portland Cement Co.* v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211.

But while this phase of the complaint deals with the alleged unfairness of a blanket existing on the refined sugar without a similar blanket on the raw sugar, further analysis shews a fundamental difference between the situations. Whether the blanket unduly disregards distance or not as to points between Montreal and the Detroit and St. Clair rivers, it appears that the refined sugar rate from Montreal and Wallaceburg is the same for substantially the same distances. Now, in the case of the raw sugar, the situation is that for a haul longer by 264 miles, Wallaceburg is 1 cent above the New York-Montreal rate. It is apparent then that the refined sugar rate affords no measure of the raw sugar rate when the disparity in distance is so great.

THE ASSISTANT CHIEF COMMISSIONER and MR. COMMISSIONER MILLS concurred.

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CITY OF HAMILTON v. GRAND TRUNK R. CO.
(Re Shunting on Ferguson Avenue, Hamilton.)
File 18292.

Board of Railway Commissioners, May 28, 1912.

1. EMINENT DOMAIN (§ III B 2—116)—RAILWAY ON STREET—COMPENSATION TO LAND OWNERS—BOARD OF RAILWAY COMMISSIONERS.

The Railway Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

2. EMINENT DOMAIN (§ IV B—195)—ADDITIONAL SERVITUDE—ABUTTING OWNERS—INCREASE OF TRAFFIC—OWNER OF LAND PRIOR TO CHANGE—COMPENSATION.

Where a railway established a freight shed and freight shunting yard which materially increased the traffic upon that part of the railway running along a city street and injuriously affected the value of the property fronting on the street to an extent not contemplated when the grant was made many years previously by the municipal corporation of permission to carry the railway line along such street, the Railway Board of Canada will order compensation to be paid by the railway to such of the landowners within the territory injuriously affected as were the owners of their property prior to such change of conditions.

3. EMINENT DOMAIN (§ IV B—195)—ADDITIONAL SERVITUDE—PURCHASE OF PROPERTY ON STREET SUBSEQUENT TO CHANGE OF CONDITIONS—NOTICE—COMPENSATION.

Purchasers of property upon a street upon which a railway is operated who bought subsequently to the establishment of a railway yard and the incidental damage to the properties on that street by reason of the shunting of cars thereon, having purchased with notice of the new conditions, are not entitled to compensation in damages as are the landowners who had acquired title previous to the establishment of the railway yard.

THE application was heard at Hamilton, October 11th, 1911, January 27th, 1912, May 28th, 1912.

George S. Kerr, K.C., for the property owners.

F. R. Waddell, K.C., for the City of Hamilton.

H. C. Beckett, for the Hamilton Board of Trade.

W. H. Biggar, K.C., and *W. E. Foster*, for the Grand Trunk Ry. Co.

The facts are fully set out in the judgment of the Assistant Chief Commissioner delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER (MR. D'ARCY SCOTT):—This is a complaint of the city of Hamilton and some residents on Ferguson avenue to the disturbance created by the Grand Trunk Railway Company shunting trains on that avenue, which

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has been before the Board on several occasions, and was the last time it was up allowed to stand to give the Grand Trunk Railway Company an opportunity of advising the Board what it proposed to do towards eliminating the annoyance complained of. It appears that the Grand Trunk Railway Company have largely discontinued shunting at night, but as they start work at five o'clock in the morning, this undoubtedly gives just cause for complaint. It is also stated that the constant shunting during the day time is a nuisance, and has the effect of depreciating the value of property on Ferguson avenue within the territory affected by the shunting.

It appears that the predecessor in ownership of the tracks on Ferguson avenue, the Hamilton and Lake Erie Railway Company, was given permission to carry its line of railway along Ferguson avenue, by the municipal council of the city of Hamilton, in a resolution passed on the 12th February, 1872, which reads:—

> Resolved, that permission be and it is hereby given to the Hamilton and Lake Erie Railway, to carry the line of railway along the whole or such portion as they may see fit, of all or any, or either of the streets in this city lying between Emerald street on the east, Ferguson avenue, Nelson street and Cherry streets on the west, including the said streets named and the streets lying between the northern and southern boundaries of the city, and extending to the westward from Emerald street aforesaid within said limits, and that a copy of this resolution duly certified be delivered by the clerk to the said railway company.

In the year 1904 the Grand Trunk Railway Company established a freight yard and built a substantial freight shed on the west side of Ferguson avenue, known as the Cannon street yard. After the establishment of this yard shunting was commenced on Ferguson avenue to get cars in and out of the Cannon street yard. The volume of this shunting has increased with the volume of traffic handled in the Cannon street yard. This increase has been very substantial, due to the great commercial development in Hamilton within the past few years. The result now is, that such a use of Ferguson avenue, in the neighbourhood of the Cannon street yard, is made by the railway company which was not in contemplation by anyone at the time. the permission to carry its line along Ferguson avenue was given to the Hamilton and Lake Erie Railway Company in 1872.

The Board has on more than one occasion, and particularly in the case of Hardisty street, Fort William, made it a condi-

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tion of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected, because of the operation of the railway on the highway, if such landowners had not been compensated in some other way.

In the present case, we cannot, of course, review what took place at the time the permission was given to the Hamilton and Lake Erie Railway Company to lay its tracks on Ferguson avenue. I have no doubt at that time the public were so anxious for the establishment of railway facilities that the people of Hamilton, including those who owned land on Ferguson avenue, welcomed the advent of the railway; but, as I have already suggested, the use of the avenue as it is now used by the shunting in and out of the Cannon street yard, is something which was not contemplated by those affected when the arrangement of 1872 was consummated.

I therefore think that those injuriously affected by this shunting should receive compensation. The Grand Trunk Railway Company should be ordered to compensate them accordingly by paying damages, to be fixed by arbitration if necessary. It may be, that the Grand Trunk can make a more satisfactory arrangement for all concerned by purchasing the lands affected outright, instead of compensating the owners. I think they should have the option of doing either, and that they should be permitted to use the expropriation powers of the Railway Act if they desired to acquire title to the lands affected.

This decision will be for the benefit only of those landowners on either side of Ferguson avenue from Cannon street southerly to Rebecca street, the zone affected by this shunting.

Some of the property on Ferguson avenue, between Cannon street and Rebecca street has changed hands since the establishment of the Cannon street yard. The purchasers of such property bought it with notice of the existing conditions, and therefore are not entitled to compensation. The order should be limited to existing landowners within the territory described who were the owners of their property prior to the establishment of the Cannon street yard.

MR. COMMISSIONER GOODEVE concurred.

Order for compensation.

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NOTES.

Railway upon Highway—Jurisdiction—Compensation to Abutting Landowners.

The judgment of the Board in this case would appear to extend its jurisdiction beyond the provisions of the Railway Act, by making it a condition of the occupation of a highway by an existing railway company's tracks, that the railway company should compensate the abutting landowners whose lands were injuriously affected by reason of the operation of the railway upon the highway.

The case of *Grand Trunk Pacific and Canadian Pacific Ry. Cos.* v. *City of Fort William, Fort William Land Investment Co. et al.*, 43 S.C.R. 412, 11 Can. Ry. Cas. 271, relied upon by the Assistant Chief Commissioner, was an appeal to the Supreme Court, which affirmed a judgment of the Board, deciding that under section 47 of the Railway Act, it had jurisdiction on an application for leave to construct and for approval of the *location* of a line of railway on certain streets in the said city, under section 159, to impose the condition that the railway company should make full compensation to all persons interested for all damages sustained by them by reason of the location of the railway along any street. On appeal (*Grand Trunk Pacific Ry. Co.* v. *Fort William Landowners, Fort William Land Investment Co. et al.*, [1912] A.C. 224, 13 Can. Ry. Cas. 187), the Judicial Committee of the Privy Council reversed the Supreme Court, holding that, under section 237 (3), the power to award damages was in respect of construction only, and sec. 47 did not, on its true construction, extend that power to meet the case of location.

During the session of Parliament of 1911, sec. 235, by 1 & 2 Geo. V. ch. 22, was amended by sec. 6 as follows:—

"Section 235 of the principal act is amended by striking out the words, 'the railway' at the commencement of the said section and substituting therefor the words, 'Subject to the company making such compensation to adjacent or abutting landowners as the Board deems proper, the railway of the company' may be carried upon, along or across an existing highway, (as in the original section)."

The real point at issue in this case, upon which the judgment of the Board depends, is, what jurisdiction has the Board over

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the location, construction and operation of an *existing* railway upon a highway as opposed to a projected or proposed railway?

From a careful reading of secs. 47, 155, 159, 235 (as amended), 237 and 238, and the foregoing decision it will be seen that these provisions apply only to a proposed or projected railway, but not to an existing one as in the Hamilton case. In 11 Can. Ry. Cas. 271, at pp. 286, 287, Mr. Justice Anglin said: "It may be that when the leave or sanction has been obtained, the obligation of the company to make compensation for damages caused by exercise of the powers thus conferred is, under section 155 of the Railway Act, as judicially interpreted so restricted that it excludes liability for injuries sustained by owners of land adjoining a highway along which the railway is carried at grade."

Section 235, dealing with *location* upon *leave obtained* gives compensation to abutting landowners by the recent amendment.

Section 237, dealing with *construction* does not deal with compensation, the jurisdiction of the Board being confined in respect of an existing railway to grant *such application* upon such terms and conditions as to protection, safety and convenience of the public, as it may deem expedient. It will be seen from this that the Board has no power to award compensation after the railway has been constructed.

The word *operation* is not mentioned in any of these sections, and this omission strengthens the argument that the sections apply only to proposed or projected railways.

It would seem, therefore, that, the Board has no jurisdiction over the location, construction and operation of an existing railway which has been operated upon the highway for many years, so as to impose the condition of making compensation to abutting landowners, claiming that their lands are injuriously affected, simply because the movement of trains upon the highway had increased of recent years, but it may be observed that sidings have been built into lands acquired on one side of the highway, constituting an additional burden upon the highway, and this circumstance may be held to justify the order.

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JURISDICTION—JOINT TARIFF.

GRAND TRUNK and CANADIAN PACIFIC RY. COS. v. CANADIAN and BRITISH AMERICAN OIL COS.

Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. June 4, 1912.

1. CARRIERS (§ IV A—59)—JURISDICTION OF RAILWAY BOARD—DECLARATORY ORDERS—JOINT TARIFF.

The Board of Railway Commissioners for Canada has power upon an application by the shipper to make a declaratory order as to what is the proper tariff of tolls applicable to a certain class of goods although no consequential relief was granted to the complainant on the application.

2. CARRIERS (§ III E—429*a*)—LEGALITY OF TARIFF OF TOLLS.

The tariffs of tolls applicable to shipments of petroleum and its productions from the United States into Canada is the "joint tariff" of January, 1907, filed with the Board to the exclusion of subsequent tariffs filed, but not sanctioned by the Board.

[*Canadian Oil Cos.* v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.*, 12 Can. Ry. Cas. 360, affirmed.]

APPEAL from an order of the Board of Railway Commissioners for Canada in favour of the respondents on an application complaining of an overcharge in rates for carrying petroleum from the United States into Canada.

The Board decided, on application of the oil companies, that the tariff filed in January, 1907, was still in force and made an order declaring that the legal rates chargeable on petroleum and its products, in carloads, from shipping points in Ohio and Pennsylvania to Toronto were the fifth-class joint through rates in effect at the time the shipments moved as shewn in the joint through tariffs published and filed with the Board. The railway companies were granted leave by the Board to appeal to the Supreme Court of Canada on a question of law, namely—Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter? Mr. Justice Idington gave them leave to appeal also on a question of jurisdiction.

Chrysler, K.C., and *Aimé Geoffrion*, K.C., for the appellants.
W. N. Tilley, for the respondents.

DAVIES, J.:—This is an appeal from an order of the Board of Railway Commissioners made on a complaint filed by the respondents whereby it was alleged that the appellants from and after the first of January, 1907, charged excessive tolls for the transportation of petroleum and its products when shipped

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from certain points in the United States to Toronto and other Canadian points. The complaint was heard by the Railway Board on May, 16, 1911. The respondents contended and the appellants denied that from and after the date mentioned fifth-class rating applied to petroleum and its products in carloads. The appellants charged the sum of the local rates to and from the Canadian gateways.

The Board's reasons for judgment were given by the Chief Commissioner. The conclusion reached as stated in the last paragraph of the reasons was as follows:—

> Official Classification No. 29 was used by the respondents without any order or direction of the Board, as provided by sub-section 4 of section 321. It was, therefore, binding upon them; and the provisions of that classification would apply upon petroleum and its products to points in Canada, unless they have taken some steps within the provisions of the statute to prevent its application. We are compelled to conclude that they have not succeeded in so doing, and that petroleum and its products should have carried fifth-class rating at the time the shipments in question moved.

The Board accordingly made an order, dated the 16th of May, 1911, declaring:—

> That the legal rates chargeable on petroleum and its products in carloads from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved as shewn in the joint through tariff published and filed with the Board, and in accordance with the Official Classification No. 29 and subsequent issues thereof.

The Board granted leave to the appellants to prosecute an appeal on the question of law as follows:—

> Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

Mr. Justice Idington also allowed an appeal on the question of jurisdiction.

The contention of the appellants as I understand it on the question of jurisdiction is that when the complaint was heard by the Railway Board on the 16th May, 1911, the Board had no jurisdiction because the wrong complained of had then been remedied and the order made was and could only be declaratory and could not give the applicant any relief.

The question of the Board's jurisdiction depends largely upon the construction placed upon section 338 of the Railway

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Act. In the case of the *Grand Trunk Railway Co.* v. *British American Oil Co.,* 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118, this Court held that joint tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory to be carried by continuous routes to destinations in Canada are effective and binding upon Canadian companies participating in the transportation until either superseded or disallowed. Such joint tariffs had been filed by the foreign companies initiating the carriage of the oil as to the tolls for the carriage of which the complaint was made. If the tariffs had been "superseded" under the 338th section of the Act as contended by the appellants by another tariff justifying the tolls charged that would be a good answer to the complaint.

Mr. Tilley, for the respondents, contended that once a joint tariff for a continuous route from a foreign country to a point in Canada was filed under the 336th section of the Act it remained in force until superseded or disallowed *by the Board,* and that admittedly there had not been any such action by the Board in this case, and further contended that assuming there was power in the company or companies by which the joint tariff was filed to supersede it nothing had been done which could be construed as supersession. The appellants contended that the superseding was something to be done by the foreign company which initiated the joint tariff and that there had been such supersession in the amendments to and alterations of that initial joint tariff subsequently filed by the companies.

Of course if section 338 vests in the Board alone as contended by respondents the power of superseding or disallowing an initial joint tariff then, admittedly that not having been done, no question could arise with respect to the Board's jurisdiction to make the order. Assuming, however, that the appellants' contention is correct with respect to the company's power to supersede an initial joint tariff after it had been filed then I am of opinion that they had not done so up to the time the complaint was filed.

On the question of jurisdiction I do not entertain any doubt. The Board (section 10) is made a Court of record. Section 26 confers upon it power "to inquire into, hear and determine any application by or on behalf of any party interested" complaining (*inter alia*) "that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act," etc.

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The Board has clearly the power to determine all disputes arising as to whether a shipper or a carrier has violated any of the provisions of the Act. It is not necessary for us to consider the extent of the relief the Board may grant in cases where it finds either shipper or carrier guilty of such violation. In the present case it finds in accordance with respondents' contention that the legal rate at the times of the shipments and carriage complained of was the fifth-class rate. Any charge above or beyond that was an overcharge. But the Board did not assume to direct any refund. It left the parties to their legal remedies if they decided to recover such overcharges.

The appellants contend that some limitation must be read into the 26th section of the Act, because if read literally it would confer power upon the Board to determine every complaint of any violation of the Act either of commission or omission and that we might have in cases of railway accidents in which passengers or others were injured the absurdity reached of the Board sitting to determine whether a bell had been rung at a crossing or a whistle blown at the times and places required by the Act. I venture to think, however, that upon a proper construction of the section no such absurd results could happen. What Parliament conferred upon the Board was power to determine complaints of failure on the part of a company, *quâ* company, to discharge or obey some statutory duty or obligation either positive or negative imposed upon it *as such company,* not complaints that some subordinate or employee of the company had failed to discharge a duty which the company charged him with and for the neglect to discharge which the company might be liable to the party suffering. That is, in my judgment, the meaning of the language used in section 26, and when so read it carries out fully the underlying idea of the Act, namely, that with private ownership there should be public effective control.

Construed as I construe section 26 there does not appear to be either justification or excuse for the Courts to read any limitation into the section. The Board has jurisdiction to hear and determine any complaint from an interested party that a company has failed to discharge or obey some statutory duty or obligation binding upon it as a company or violated some prohibition of the Act or they might, under the 49th section, make an interim *ex parte* order as to such failure or violation of their own mere motion and without complaint. Such jurisdiction,

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however, does not extend to the failure on the part of an employee to discharge a duty with which he was charged by the company alike to it and to the public. It is true that the section speaks of a company or person, but that word person as used in the section does not embrace or include employees of the company who fail in the discharge of the duties with which they are charged by the company. Different considerations would apply where the Railway Act or the special Act or a regulation of the Board imposed directly upon an individual person or official, as distinct from the company he represented, a duty or obligation to do or abstain from doing some act or thing. Beyond that the Act does not profess to go. Nor do I attach any weight to the contention that the order complained of does not profess to give any relief and that the Board had no power to give relief under the circumstances. In my opinion the determination of the facts as to the legal tariff in operation during the period the order covers is one peculiarly fitting for the Board. The mere fact of the company desisting from the violation complained of before the hearing of the complaint does not oust the Board's jurisdiction. Whether they could have supplemented their order with another directing a refund I am not called upon to determine. That question would probably have called for a wider inquiry and a great deal of evidence as to the overcharges paid by different individuals more suitable for the ordinary Courts of the land to hear and decide. But that this Board, experienced men on the subject before it, advised by trained experts and possessing in its records at first hand all the evidence necessary to determine the subject-matter of this complaint as to whether in the first place there had been a joint tariff established for the carriage of this oil from the United States to Canada, and secondly, whether that tariff had been superseded by another at the time the complaint was filed, or was then still in force, and lastly, whether the complaint in whole or in part as to overcharges on the oil was well founded, was the proper tribunal to make such determination I have no doubt.

With the results which may follow their finding and order I am not at present concerned. Whether their finding on the facts as expressed in their order will be binding and conclusive on the ordinary Courts of the land in the event of suits being brought to recover the overcharges it would not be proper for

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me to express any opinion now. It is sufficient for me to say that, in my judgment, the Board had jurisdiction to make the order appealed from.

As to the question of law whether the Board placed the proper legal construction on the documents referred to in the reasons for judgment of the Chief Commissioner I can only say that I think it did. The joint tariff filed by the foreign company gave the Board jurisdiction as determined by us in the *Stoy Case,* 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118. Whether it was superseded or not by the amended tariffs filed by the foreign company is a question of law, and has been referred in this appeal to us. In my opinion this question of law was properly determined by the Board and therefore having jurisdiction on the subject-matter and having properly determined it the appeal fails.

It is not necessary for us to determine whether the Board has the sole jurisdiction to supersede any such joint tariff so filed or whether the company filing it can supersede it. If the Board alone had the power to supersede such joint tariff such supersession has admittedly not taken place. If the company has the power it has not expressed it properly and the joint tariff remained in force when the complaint was laid. I cannot put the argument as to the supplementary tariffs filed and their effect as superseding the joint tariffs more clearly or concisely that it is put by the Chief Commissioner in the following remarks:—

> We do not see how a tariff, changeable as to tolls, at the will of either, without reference to the other, can be said to be a joint tariff. This must mean a tariff that all participating carriers are interested in jointly; not interested jointly in part only, but in the entire tariff; including not only the through or continuous route, but also the through rate or toll. In the case in hand the attempt is not to destroy the entire joint tariff; the continuous route, through billing, accounting, etc., are preserved, but the partnership is attempted to be, in part, dissolved by saying all our other arrangements regarding the carriage of this traffic shall remain, but hereafter each carrier shall fix its own local, and the through rate shall be the sum, or combination of those locals that may be in effect when and as shipments move. It seems to me that this is just what section 338 was designed to prevent, and this is particularly so with reference to traffic falling under section 336, where Parliament has paid such a tariff shall be filed, but has no means of compelling the foreign carrier to comply with its direction. That carrier complying, it seems reasonable to

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say, unless the Board disallows that joint tariff those shall be the tolls to be charged until you file another joint tariff shewing other or different tolls; when, unless disallowed, those latter shall be the only lawful tolls until again superseded by another joint tariff.

I agree that the appeal should be dismissed with costs.

IDINGTON, J.:—The question raised by the appeal herein relative to the jurisdiction of the Board of Railway Commissioners for Canada, seems to me after it has been thoroughly argued out to be without foundation.

The respondents' complaint having been lodged against the appellants whilst they persisted in maintaining a rate of tolls found by the Board to have been unjustifiable, the Board would have been derelict in duty if it had refused to continue the hearing simply because the appellants had abandoned the unfounded claims to rates. Not only had the Board the admitted power to have adjudged costs of the inquiry if it had found it just to award same, but also the power and duty to make a ruling that would guide such like parties in a future dispute of the like kind and enable them to avoid such positions as the Board could not justify. Appellants, no doubt, felt this, when they appeared before the Board and, without protest, contested the matter on its merits. It is not necessary to deal with long arguments founded on the hopes or fears of such uses as may or may not be made of the ruling in future or pending litigation, further than to say I think that we cannot here properly pass upon the questions of whether the ruling is or is not a declaration within section 318. I have no opinion thereon.

A question of law which the Board submitted is stated as follows:—

Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

The complaints lodged by respondents against each appellant were identical, were heard together and the judgment of the Chief Commissioner deals with both as founded on the like conditions of fact. The question raised therein must turn on the construction to be given sections 336 and 338 of the Railway Act supported or illuminated by sections 314, 321, sub-section 4, and other sections of the Act.

As pointed out in the case of *The Grand Trunk Railway Co.* v. *The British American Oil Co.*, 43 Can. S.C.R. 311, 11 Can.

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Ry. Cas. 118, the Railway Act does not profess to confer any jurisdiction over foreign railway companies, but recognizes that relations may exist between those companies and the Canadian railway companies which so far as the latter are concerned may, as regards shippers over their roads, become the subject of administrative or judicial control in Canada.

The foreign companies, within a recognized area, associate together for the purpose of determining, amongst other things, their dealing with the subject of freight rates, classifications of freights, and through routes and rates; and the appellants have representatives in this association or relations therewith, relative to such subjects, so far as a common purpose may require. These foreign companies, or the association on behalf of them, had filed joint tariffs with the Board, and then in the month of January, 1907, filed also an official classification, No. 29, which placed the commodities now in question in the fifth class and thereby constituted a common through route and joint tariff and continuous through routes and joint tariffs within the meaning of section 336 of the Act, which reads as follows:—

> 336. As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board.

These several through routes seem to have been continued and operated, over the period in question, by the foreign railway company and the respondents respectively. Neither of the appellants, however, whilst availing themselves thereof adhered to the joint tariff thus constituted in January, 1907, but it is said later on charged the respondent higher tolls than could have been legally collected under such joint tariff or joint tariffs as settled by the filing of No. 29, Official Classification.

They allege in justification that any joint tariff so constituted was subject to variations to be made therein by the foreign companies, or any of them, by means of supplements to the Official Classification. On the other hand it is urged and has been ruled by the Board that such an official classification coupled with the through rate then existent constituted a joint tariff, or joint tariffs, relative to the commodities in question that could not within the Railway Act be departed from by the

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Canadian companies in such an irregular manner. In other words, the Board holds that the latter cannot abandon the joint tariff and yet continue the through route.

Section 338 of the Railway Act is the only means it gives for terminating a joint tariff. It is as follows:—

> 338. Joint tariffs shall, as to the filing and publication thereof, be subject to the same provisions in this Act as are applicable to the filing and publication of local tariffs of a similar description; and upon any such joint tariff being so duly filed with the Board the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls as specified therein: Provided that the Board may except from the provisions of this section the filing and publication of any or all passenger tariffs of foreign railway companies.
>
> 2. The Board may require to be informed by the company of the proportion of toll or tolls, in any joint tariff filed, which it or any other company, whether Canadian or foreign, is to receive or has received.

One interpretation of this section contended for is that the plain grammatical meaning thereof is just what the words "superseded or disallowed by the Board" imply, and that, therefore, no departure from a joint tariff can be made by a Canadian company without the sanction of the Board. It is urged, however, that other sections dealing with the subject of joint tariffs indicate that such is not the intention.

There are three other joint tariffs dealt with by the Act—one the passenger, specially excepted from the section 338, if the Board says so—another the joint tariff for freight originating in Canada and going to a foreign country, and a third for exclusively Canadian routes, and indirectly, as it were, a fourth which I need not refer to. The joint tariff for exclusively Canadian routes is in its formation liable to be either the product of the action of the companies or to be imposed by the Board. It is, however, whether directly or indirectly, apt to be so much the crèation of the Board that I do not see how the provisions relative thereto or to the ordinary tariff charges on wholly Canadian roads, can help us much to interpret section 338. There certainly is a degree of liberty given all companies relative to changes of their own tariffs that does not seem in terms extended to the joint tariffs which any of them may take a part in forming. To my mind that fact itself is more instructive than anything which may be drawn from similarity of expression

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relative to the superseding or of the disallowance by the Board, as, for example, in section 328, sub-section 4, so much dwelt upon. The apparent liberty to change a tariff does not apply to a changing of route such as is the foundation of a joint tariff. In Canada the Board can make or unmake this foundation. One thing is quite clear in this Act and that is that it was the intention of the Legislature to give the Board as effective control as it possibly could over the tolls. And even if the word "superseded" in section 338 is to imply that the companies concerned may have some liberty of action or some say relative to the changing of a joint tariff, it does not seem to me consistent with such purpose of control by the Board that the Canadian companies were ever intended to be parties to any scheme that in fact was not, or did not include in it, the actual creation of a joint tariff in any substitution intended to supersede a joint tariff which must be presumed to have received its sanction by the act of filing with, and fact of non-rejection by, the Board. In that way and sense the words of section 338 now in question can each be given effect to. It does not appear quite clear, on the material before us, how the obvious purpose of the Act, that each change should have the Board's approval, is supposed to have been in any case brought about. It may arise from regulations that are not in the case or from practice. It nowhere appears that a change of through route is permissible to the companies without being accompanied by a joint tariff.

The Canadian companies seem bound to have a joint tariff corresponding to each through route over a combination of roads, or parts of roads, and their own, and that of either joining with the foreign companies to constitute it. I have no doubt the objects of section 318 can best be attained by thus holding a check over such combinations. And even if it be implied that those furnishing a through route may change or supersede the tariff, it must be by means of a joint tariff. The departures herein were not joint tariffs. So the Board has found, and I think, correctly. We must assume, I think, that the freight classification (such as No. 29) in the United States referred to in sub-section 4 of section 321, was the basis of all the Board had impliedly sanctioned, and that partial departures therefrom were not within their recognition. The possible hardship of having to account for tolls collected by the respective appellants in cases not conforming with the preceding principles and accounted for to the foreign companies, is no argument. The Can-

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adian companies must in all such cases conform to Canadian law, and clearly when making a through route be sure they have a corresponding joint tariff, or ask the Board for relief.

Hence this appeal should be dismissed with costs and the question of law submitted be answered in the affirmative.

Canadian Pacific Railway Co. v. *British American Oil Co.* —The question of the jurisdiction of the Board herein raised is somewhat more arguable than in the case of the joint appeal of this appellant and the Grand Trunk Railway Company against the Canadian Oil Companies heard just before this. It seems clear that a formal complaint, such as I presume the rules of the Board require, was not made until the continuation of the offences in question had been abandoned. There was, however, a clear complaint in writing to the Board before the appellant abandoned what was objected to and there was, so far as I can see, nothing to prevent the Board acting thereon and for the time being to waive its own regulation I have presumed to exist. The jurisdiction exists, therefore, for reasons I gave in the other case.

The ground respondents' counsel takes under section 318 may be good, but I do not desire to pass upon that section till I have to. Nor yet do I desire to cast any doubt upon what support it may or may not give and which respondent may need elsewhere. I have no opinion. The question of law herein submitted by the Board seems pretty much what I had supposed was disposed of in the case of *The Grand Trunk Railway Co.* v. *The British American Oil Co.*, 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118. What I said in that case, and have said in the other case above-mentioned, will furnish my reasons herein and I need not repeat them here. The consequence thereof seems to me to be that the supplements, which are said not to have been dealt with therein and are shewn more fully herein, cannot affect the rights of the parties. The answer to the question submitted ought to be that the filing of the supplements had no legal effect on the joint through rate established 25th of January, 1907, and the appeal ought to be dismissed with costs.

DUFF, J.:—By the order out of which these appeals arise (dated the 16th of May, 1911), the Board of Railway Commissioners for Canada declared that the "legal rates chargeable upon petroleum and its products, in carloads," in respect of certain shipments from certain "shipping points in Pennsylvania and Ohio to Toronto were the fifth-class joint through

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rates, etc., thereof." From this order both of the railway companies appeal by leave of the Board upon a question of law and upon a question of jurisdiction, by leave under an order made by Mr. Justice Idington.

The question of law (with which I shall first deal), is stated in these terms:—

> Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

It was agreed on both sides that the point which it was intended to refer was that which was the real point in controversy before the Board, namely, whether the legal effect of the documents mentioned was correctly stated in the declaration I have just quoted.

The complaint of the respondents, the Canadian Oil Co., was that the railway companies had unjustly discriminated against certain shipments of crude oil (from the shipping points mentioned to Toronto), by refusing to carry that commodity at the rates prescribed in the tariffs filed. The shipments in question were made between the first of January, 1907, and the thirty-first of December, 1910, and the contention of the applicants, which the Board upheld, was that during the whole of that period the rates legally chargeable on such shipments were the rates referred to in the order of the Board, the rates, that is to say, which were legally chargeable at the dates of the shipments as "joint through rates" for commodities of the fifth class according to the classification mentioned and according to the "joint through tariffs" published and filed with the Board.

For the purposes of the argument on this appeal it was admitted that in consequence of the filing of "Official Classification No. 29," by which "petroleum and its products" were for the first time classified as commodities of the fifth class, the "joint through" rate for commodities of that class must be taken to have become applicable to crude oil, on January 1st, 1907. That point was determined adversely to the railway companies by the judgment of this Court in *The Grand Trunk Railway Company* v. *The British American Oil Company*, 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118, confirming a ruling of the Board.

The contention of the railway companies is that by a series of tariffs filed subsequent to that date "petroleum and its products" were taken out of the category of commodities of the

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fifth class so far as regards shipments into Canada from the shipping points in question. By these various tariffs the railway companies concerned endeavoured to abrogate the "joint through rate" in force for these commodities in respect of such shipments and to substitute therefor a rate which should be made up of the sum of the local rates (1) from the point of origin to the Canadian gateway, and (2) from the Canadian gateway to the point of destination, which should be in force when the shipment should move. The question referred by the Board is, in substance, the question whether the railway companies have succeeded in accomplishing this. The tariffs upon which the appellants rely are very numerous, but it will be found on examination (as pointed out in the appellants' factum), that the methods adopted by the carriers to attain the object they had in view may be classified as follows:—

(1) By a supplement to a joint tariff concurred in by the carriers, providing that the rates to points in Canada shall be the local rates to the frontier plus the local rate beyond.

(2) By providing by joint freight tariffs, containing so-called exceptions to the Official Classification that the Official Classification basis shall not apply to points in Canada, but that these rates shall be made on the sum of the locals.

(3) By providing by joint freight tariffs or supplements thereto, that the through rates to points in Canada shall not apply.

(4) By providing by such supplements that no through rates are in effect.

All these methods, if effective, would result in the same thing, namely:—the rate for shipments of the commodities affected from the shipping points in question into Canada would be a variable rate made up of the sum of the local rates in force from time to time, first, from the point of shipment to the Canadian gateway, and secondly, from the Canadian gateway to the terminus of the route. These tariffs were concurred in by all the carriers concerned, but none of them had the sanction of the Board.

The Board has held that these methods were ineffective for the purpose the railway companies had in view. I concur in that opinion and I agree, moreover, with the reasons which were given in support of it by the distinguished and lamented Judge who then filled the office of Chief Commissioner. Each of the shipments in question, it is, of course, admitted, passed over a "continuous route" in part "operated" by one of the

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appellant companies. In such a case, by section 336 of the Railway Act, a "*joint tariff for such continuous route*" must be filed (according to the decision in the case already mentioned), and the "company or companies" operating the route are required, by section 338 (to charge the toll or tolls specified therein "until such tariff is superseded or disallowed by the Board." There has been in this case no action by the Board. It is not strictly necessary to pass upon the point, but the view I am disposed to take is that the language of the section does not require us to hold that every "joint tariff" is only subject to alteration by the action of the Board; I think there is no satisfactory ground for drawing such a sharp distinction between a "joint tariff" and other freight tariffs. It would not, of course, necessarily follow that every "joint tariff" would be subject to alteration at the will of the parties. It may be, for example, that on the true construction of section 334 a "joint tariff" framed pursuant to an order of the Board under that section remains in force until displaced by the Board itself.

However that may be, the Act plainly contemplates that for a "continuous route" to which section 336 applies there shall be a "joint tariff." That being so, then (assuming the companies operating such route to have in some cases the power to "supersede" by their own action a "joint tariff" once established without invoking the sanction of the Board) it must be taken, conformably to the principle declared by section 336, that such supersession necessarily involves the establishment of another tariff which itself falls within the category of "joint tariff," within the meaning of that phrase as used in the sections referred to. I agree with the late Chief Commissioner that a tariff of rates made up of variable local rates does not fulfil that condition.

The question of jurisdiction remains. I confess I can entertain no doubt that each of the several orders of the Board of the 16th of May, 1911, records and was intended to record an adjudication by the Board in its judicial capacity upon an issue between the complainants and the company or companies respectively against which the complaints were lodged; and I have come to the conclusion that the Board had, under section 26, jurisdiction to make the declarations contained in those orders.

The contention on behalf of the appellants is that the jurisdiction of the Board to adjudicate *inter partes* upon questions of law or of fact is confined to cases in which the Board has

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jurisdiction to give some consequential relief. The answer to the contention appears to be that sub-section (*a*) of section 26 confers the broadest jurisdiction to decide upon complaints with respect to past offences of omission or commission and the form of the sub-sections (*a*) and (*b*) suggest that the jurisdiction to pass upon such complaints is intended to be exercisable independently of the jurisdiction under sub-section (*b*). There are, obviously, many reasons of good sense and policy why such a jurisdiction should be exercisable by the Board; and I think there is no ground upon which the restriction contended for can be sustained.

ANGLIN, J.:—The Board of Railway Commissioners, on the application of the Canadian Oil Companies, Limited, made an order in which, following an introductory recital of facts,

> it is declared that the legal rates chargeable on petroleum and its products, in carloads, from the said shipping points in the States of Ohio and Pennsylvania to Toronto, Ontario, were the fifth-class joint through rates in effect at the time the said shipments moved, as shewn in the joint through tariffs published and filed with the Board, and in accordance with the Official Classification No. 29, and subsequent issues thereof.

By leave of the Board the railway companies appeal from this order on a question of law formulated by it in this form:—

> Did the Board place the proper legal construction on the documents referred to in the judgment of the Chief Commissioner in this matter?

By leave of my brother Idington they also appeal on the ground that in making the above order the Board acted without jurisdiction. On this branch of the appeal two points are urged:—

> (1) That before the Board heard the application the use of the combined local rates complained of had been discontinued and the joint tariff demanded by the applicants had been restored, or brought into force, and the Board was, therefore, not called upon and was not in a position to afford any relief, and should not have proceeded to pronounce a merely declaratory order.
>
> (2) That the order purports to declare illegal rates charged by the United States railways from the points of shipment to the Canadian border.

The substantial grievance of the appellants is that they anticipate that in prospective actions by the Canadian oil companies to recover from them the sums paid for freight on ship-

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ments of petroleum from the United States shipping points to Toronto (the freight charges for the entire continuous routes were collected by the Canadian railway companies on delivery to the consignees) in excess of the joint tariff rates which the order of the Board declares to have been in force, that order will, under section 54 of the Railway Act, be used to establish conclusively their liability to refund.

I shall deal first with the questions of jurisdiction. By the Railway Act, notably by sections 26 and 318, the Board is empowered to "inquire, hear and determine" and to "determine" (which involves inquiry, if not hearing) complaints in respect of anything which a railway company "has done or is doing" in contravention of that statute, etc. While ordinarily such an inquiry and determination will be had for the purpose of deciding the right of an applicant to some relief and will, in proper cases, result in an order affording such relief, there may arise many cases in which, although the particular practice complained of has ceased, it may be desirable to institute, or to pursue, an investigation and to reach and formulate a determination for the future guidance of the railway company against which complaint has been made and of other railway companies and of the general pubilc in regard to matters kindred to that which forms the subject of inquiry. What the Board may do under section 26 at the instance of a complainant, it may do under section 28 "of its own motion." While I more than gravely doubt that it was the intention of Parliament to constitute the Railway Board a tribunal for the determination of facts in cases of alleged contraventions of the Railway Act or of regulations made under that statute or of orders of the Board, etc., merely as a step towards, and to facilitate the prosecution of civil actions brought or to be brought against railway companies by aggrieved persons to obtain relief in damages or otherwise, I entertain no doubt that for the other purposes above indicated the Board possesses the jurisdiction which it has exercised in the present case. There is nothing before us to suggest that its object in making the order appealed from was to enable the respondents to use it under section 54 as a foundation for proceedings in the civil Courts. If this order may be so used that is merely an incidental consequence which does not displace the jurisdiction of the Board to make it and is a phase of the matter with which we are not presently concerned.

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The order as drawn affects only the Canadian railways which were before the Board. It does not purport to declare illegal any charges made by the foreign railways which operated those parts of the continuous routes beyond the Canadian gateways. It necessarily deals with the joint tariff which the Board (rightly, having regard to the decision of this Court in the *Stoy Case*, 43 Can. S.C.R. 311, holds had been established for the continuous routes operated by the Canadian and foreign railways. It merely declares that, because that joint tariff had not been "superseded or disallowed" in accordance with the provisions of the Railway Act, it is still binding on the Canadian railways for the entire continuous routes. Whether the effect of this order will be to enable the respondents to recover from the appellant companies the whole amount paid them in excess of the joint tariff rates for the entire continuous routes is a question not now before us.

I cannot see in an order which does nothing more than declare that as to the Canadian railways which were before the Board the joint tariff to which they became parties continues to bind them, anything in excess of the jurisdiction conferred by Parliament on the Railway Board. On the question of law submitted to us I am also of the opinion that the appeal fails. The respondents maintain that if it were competent for the railway companies by their own joint act to "supersede" the joint tariff which became effective on the 1st of January, 1907, under the application of Official Classification No. 29, adopted pursuant to sub-section 4 of section 321 of the Railway Act, they did not take effective steps for that purpose. I find it difficult to understand why, having regard to the terms of the consents filed by the Canadian railway companies (especially that of the Canadian Pacific Railway Company), in virtue of which the tariffs filed only by the American railway companies have been held to be joint tariffs, 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118, the filing by the same companies of supplements or amendments to such joint tariffs should not be deemed joint acts of the American and Canadian companies, and, if railway companies had the power of superseding joint tariffs, should not be effective for that purpose. (See section 323, sub-section 3). But if the railway companies had the power of supersession in regard to a joint tariff I incline to the view that it would properly be exercised only by an amendment or supplementing of the tariff itself and not by

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filing an exception to a freight classification used under the authority of section 321, sub-section 4. It is, in my opinion, not competent for a railway company operating the Canadian section of a continuous route to or from a point in the United States to use a freight classification in use in the United States subject to a special exception in regard to goods to be carried to or from Canada. The "freight classification in use in the United States," of which the use is authorized by sub-section 4 of section 321, means a freight classification in general use in that country under which goods of the same kind will be treated as in the same class when shipped for carriage to or from Canada as when shipped for local carriage in the United States. I am, therefore, of the opinion that if railway companies had the right by their own action to supersede joint tariffs, they could not do so in the case of a joint tariff for a continuous route, partly in Canada and partly in the United States, by specially excepting from a classification in use in the United States, either when adopting it or afterwards, all goods, or any particular kind of goods destined for or shipped from Canadian points. If a railway company sees fit to adopt for such a route a freight classification in use in the United States which contains such an exception, it will, I think, be bound by the classification without the exception. But in the view which I take it is not necessary to dwell further upon, or to definitely determine these questions.

In my opinion upon the proper construction of section 338 of the Railway Act, it is not competent for two railway companies, one foreign and the other Canadian, which have filed or concurred in the filing of a joint tariff, themselves to "supersede" it. It can be "superseded or disallowed (only) by the Board." Section 338 does not itself confer powers of supersession and disallowance. These powers are given to the Board by section 323, and to the powers so conferred section 338 refers. Domestic "special" tariffs may be superseded within defined limits (section 323, sub-section 3; section 328, sub-section 3; section 328, sub-section 4; section 332, sub-section 3) by the railway company itself filing a new "special" tariff. But section 338 appears to preclude the supersession of joint tariffs, whether purely domestic or partly domestic and partly foreign, by the railway companies, inasmuch as it enacts that such tariffs when duly filed shall bind them until "superseded or disallowed by the Board."

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In section 328, sub-section 4, and again in section 332, sub-section 3, the supersession of domestic special tariffs by the filing of new special tariffs is provided for. The language used is:—

> Upon any such (special freight) tariff being so (duly) filed, the company shall, until such tariff is superseded, or *is* disallowed by the Board, charge the toll or tolls as specified therein; *and such (special freight) tariff shall supersede any preceding tariff or tariffs or any portion or portions thereof, so far as it reduces or advances the tolls therein.*

In sub-section 3, of section 332, the comma, found after the word "superseded" in sub-section 4, of section 328, is omitted; and for the semi-colon after the word "therein," where it first occurs, a comma is substituted. These differences I regard as purely accidental. But in section 338 the word "is" is dropped before the word "disallowed," and the clause which I have italicized, found in sections 328 and 332, is wholly omitted. These changes were, in my opinion, deliberate. The important clause in section 338 reads:—

> And upon any such joint tariff being so duly filed with the Board, the company or companies shall, until such tariff is superseded or disallowed by the Board, charge the toll or tolls specified therein.

Grammatically, the words "by the Board" apply equally to the two verbs "is superseded or disallowed." Not only do I find no ground for discarding the grammatical construction, but there appear to be several reasons for adhering to it. Comparison with sections 328 and 332 makes it reasonably clear that the departure from the language of those sections was intentional. Under section 323 the Board has a power of supersession in the sense of replacing. "Remplacé" is the translation of "superseded" in the French version of section 338.

The Board's jurisdiction probably does not extend to requiring a foreign company and a domestic company to unite in filing a joint tariff under section 336. (Compare section 335 and note the difference in form.) It apparently has not the power, if a joint tariff once filed has been disallowed or has been withdrawn with its approval, subsequently to require the filing of another joint tariff to take its place. The only means by which it can deal with such cases appears to be to prevent Canadian companies from participating in the operation of continuous international routes until satisfactory joint tariffs are duly filed. But it seems to be the scheme of the Act to enable the Board to retain control once acquired by providing that if a joint tariff has been filed it shall remain operative and

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binding at least upon Canadian companies interested until the Board sees fit to supersede or disallow it, and by denying to the railway companies in respect of joint tariffs, the power which is given in respect of special domestic tariffs, of superseding or abrogating them by merely filing new special tariffs to replace them.

For these reasons, bowing to the decision of this Court in the *Stoy Case*, 43 Can. S.C.R. 311, 11 Can. Ry. Cas. 118, while respectfully adhering to the dissenting opinion which I there expressed, I am of opinion that this appeal should be dismissed with costs.

Canadian Pacific Railway Co. v. *British American Oil Co.* —What I have said in regard to the *Canadian Oil Companies Case*, applies to this appeal, which should likewise be dismissed with costs.

BRODEUR, J.:—I am of opinion that the appeal in each case should be dismissed.

N.B.—Leave to appeal to the Privy Council was granted, December 13, 1912.

Appeals dismissed with costs.

RAILWAY CROSSING.

CAMPBELLFORD, LAKE ONTARIO AND WESTERN RY. CO. v. CANADIAN NORTHERN ONTARIO RY. CO.

Board of Railway Commissioners. May 23, 1912.

(File No. 3701.20.)

1. RAILWAYS (§ II B—16)—CONSTRUCTION AND OPERATION — RAILWAY CROSSING—SUBWAY—CONTRIBUTION.

The Canadian Northern Ontario Railway crossed under the line of the Grand Trunk Railway by means of a subway. Subsequently the Campbellford, Lake Ontario and Western Railway obtained authority from the Board to cross the C.N.O. Ry., using for that purpose the embankment of the same subway.

Held, that the C.N.O. Ry. was not entitled to receive any contribution from the C.L.O. & W. Ry. towards the expense it had already incurred in making the embankment.

THE application was heard at Toronto, May 23, 1912.

Angus MacMurphy, K.C., for the Applicant.

F. H. Phippen, K.C., for the Respondent.

W. E. Foster, for the Grand Trunk Ry. Co.

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The facts are fully set out in the judgment of the Assistant Chief Commissioner delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER:—In this matter the Board is of the opinion that the applicant line should parallel the Grand Trunk, as suggested by Mr. Mountain, with seventeen foot centres instead of fifteen. That will make it perhaps a little easier to operate from a signalling point of view.

The object of the Board in ordering the applicants to change their line and go as we have said is to reduce the length of the subway which carries the Canadian Northern underneath, and to reduce the length of the subway which carries the highway underneath and make it more suitable and safer for the general public.

As far as the application of Mr. Phippen is concerned for compensation for the benefit which the applicants will get by using part of the embankment which the Canadian Northern constructed for the Grand Trunk when they were diverting the Grand Trunk line in order to procure the subway which they now have there, we are of poinion that that application cannot be granted.

It is a settled transaction. The arrangement was that the Canadian Northern were to divert the Grand Trunk line, and they were to get the benefit of going underneath. They did the work and they got the benefit. It is a closed transaction. It is really no benefit to the Canadian Pacific Railway Company to order them up there; it is going to cost them more money, even though they get the use of the top of the embankment, to go there. They do not want to go there, but we think they should go there in the public interest.

Therefore, we do not entertain the application of the Canadian Northern for any contribution towards the outlay the Canadian Northern have been put to in connection with the construction of that embankment.

For any Grand Trunk land that the applicants are taking they will have to compensate the Grand Trunk by providing them with the same area of land on the other side of their right-of-way. Therefore, when the applicants put in a new location plan carrying out the judgment of the Board, it will be approved

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UNJUST DISCRIMINATION.

CONSUMERS' CORDAGE CO. v. GRAND TRUNK AND CANADIAN PACIFIC R. COS.

(File No. 19107.)

Board of Railway Commissioners. March 8, 1912.

1. CARRIERS (§ IV C 1—525)—BOARD — TOLLS — INCREASE — COMMODITY RATES — UNJUST DISCRIMINATION.

The Board allowed tariffs which had the effect of cancelling commodity rates less than 5th class theretofore enjoyed for many years on rope in carload lots out of Montreal upon its appearing that Montreal was the only point in Canada where a less than 5th class rate applied and that there had, therefore, been unjust discrimination in favour of Montreal against other Canadian points

[*Town of Welland* v. *Canadian Freight Association* (*Plymouth Cordage Co.'s Case*), 13 Can. Ry. Cas. 140, followed.]

THE application was heard at Montreal, February 23, 1912.

W. S. Tiltson, for the Applicant.
W. H. Biggar, K.C., for the Grand Trunk Ry. Co.
E. W. Beatty, for the Canadian Pacific Ry. Co.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

March 8, 1912. ASSISTANT CHIEF COMMISSIONER:—The Consumers' Cordage Company of Montreal has been enjoying commodity rates on rope in carloads less than 5th class, in which class rope is in the Canadian Classification. By tariffs G.T.R., C.A. 66, C.R.C. No. E 1432, and C.P.R. E. 868, C.R.C. No. E 1286, the railway companies sought to cancel these commodity rates so that rope would move under the 5th class rating.

Before the effective date of the proposed change the complainants called the attention of the Board thereto, and by order No. 15844, dated 27th January last, the effective date of the proposed change was postponed until further order of the Board.

In the Offical Western and Southern Classification rope is 4th class, although by exceptions in the Official it is reduced to 5th class by some carriers.

Rope manufactured in Canada is protected from foreign competition by a customs duty. There is no rate on rope from United States points into Canada less than 5th class.

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Rope is manufactured at several points in Ontario, viz.: Peterborough, Welland, and Walkerton. From all these points it moves on 5th class rating.

Montreal is the only point in Canada where less than 5th class rates apply to the movement of rope. These Montreal rates have been in effect for a number of years. The same commodity rates were enjoyed by rope and binder twine out of Welland. By the order of the Board, No. 15286, dated March 15th, 1910 (but not issued until November 9th, 1911), in the *Plymouth Cordage Company Case* (File 1278, Case 4458) the Board ordered revised commodity rates on binder twine out of Welland. In complying with that order of the Board the railway companies cancelled the existing commodity rates which had included both binder twine and rope, and issued a new tariff in accordance with the order of the Board, on binder twine only. That put rope in the 5th class. Although that state of affairs has been in existence now for some time, I am not aware of any formal complaint against it. I see no reason why rope and binder twine should be covered by the same tariffs. Rope is more valuable, and binder twine moves in much larger quantities.

As matters stand now, there is discrimination in favour of Montreal against these Ontario points I have mentioned. Unless the Board is satisfied that the 5th class rating on rope from all points in Canada is too high, and I am not of that mind because we have not had evidence upon it, it seems to me the only way to equalize the rates on rope is to permit the railway companies to do as they desire: *i.e.*, to cancel the commodity rates and have rope move 5th class out of Montreal. This, at any rate, will have the effect of putting all manufacturers of rope on an equality.

I, therefore, think that, an order should go permitting the railway companies to issue the amendment to their tariffs which they desired to issue on the 29th of January last. In order that the manufacturers may have an opportunity of regulating their business to suit the new rates they should not become effective until the first of June next.

THE CHIEF COMMISSIONER concurred.

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EMBARGO.

MARCHAND SAND CO. v. CANADIAN PACIFIC R. CO.

(File No. 20345.)

Board of Railway Commissioners. October 23, 1912.

1. CARRIERS (§ IV B—521)—INTERSWITCHING ON RAILWAYS—PRIVATE SIDINGS—EMBARGO ON CARS OF ANOTHER RAILWAY.

The Railway Commission may order discontinued an embargo placed by a railway against receiving, for interswitching delivery, upon private sidings of their line, the loaded cars of another railway from stations on such other railway, if taken merely as a means whereby to recover cars of the railway placing such embargo located along the line of the railway from which the shipments originated, where there were at the points of shipment no cars belonging to the railway seeking to enforce such embargo available for the use of the shippers affected thereby.

COMPLAINT of the Marchand Sand Company of Winnipeg that the Canadian Pacific Railway has embargoed sand loaded in cars other than their own on shipments into Winnipeg from points on the Canadian Northern Railway (File 20345).

MR. COMMISSIONER MCLEAN:—The Marchand Sand Company's pit is located at Marchand, Manitoba, on the line of the Canadian Northern Railway, a distance of forty-seven miles east of Winnipeg.

The embargo complained of was put in force on July 4th of the present year. Mr. Beatty, in his letter of August 16th, quotes Mr. Bury as saying:—

> An investigation made some time ago shewed that dealers in sand, gravel, lumber and other classes of building material were bringing their freight in over the Canadian Northern, and ordering it transferred over to the Canadian Pacific Railway yards to be delivered off our team tracks. This was not in accord with the interswitching order of the Board of Railway Commissioners, and we notified the transfer agency that we would not accept local cars from the Canadian Northern Railway for team track or freight shed delivery.
>
> As I understand the order, it was certainly not the intention of the Board to order that team track and freight shed facilities should be held in common, but merely to provide that where consignees had private siding facilities on one railway, they should not be denied the right to bring their freight into the same city over a competing railway.

The following statement of Mr. Bury, viz.:—

> To prevent foreign cars coming over which we are unable to get back again and to give them an incentive to return our cars, we issued

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an order some time ago that we would not accept from the Canadian Northern sand, gravel and other building material destined for delivery on sidings on the Canadian Pacific Railway unless loaded in Canadian Pacific cars,

puts the matter on another ground by stating in substance, not that the embargo was due to a congestion of facilities, but to an attempt to recover Canadian Pacific cars.

The Canadian Northern officials state that while the Canadian Pacific contends that the former railway has a large number of Canadian Pacific cars on its line, it is not stated where such cars are located. They further state that under date of October 19th, they have 2,100 Canadian Pacific cars on their line, 396 of which are in Winnipeg, leaving about 1,700 they can use, of which number 1,200 are west of Humboldt, leaving approximately 500 on the Central Division. Of the latter figure 260 are east of Winnipeg under load, leaving about 250, 90 per cent. of which are under load. The Sand Company's loading at the pit affected by the embargo, requires at least 75 cars per day. The Canadian Pacific arranged, on September 26th, that the Canadian Northern would be permitted to use for loading of sand, cars received from the former railway in switching service. This relieved the situation somewhat.

It having been found impossible to obtain any adjustment of the matter by correspondence, the matter has been looked into by an inspector of the Board. He advises as follows:—

On July 24th last, the Canadian Pacific Railway Company notified the Canadian Northern Railway that they would accept shipments of sand or gravel only when loaded in Canadian Pacific cars. Mr. Scott states as a result of this embargo, his company have been unable to make deliveries according to contracts previously made, and are now obliged to refuse shipments to their old customers because of not being able to deliver to private sidings on the Canadian Pacific Railway. Mr. Scott cites one case where he had a contract with one firm for five hundred cars to be delivered on Canadian Pacific private sidings in Winnipeg, and before signing contract with the firm, he went to the railway officials of both roads to ascertain if there would be any difficulty in obtaining cars for this contract, and also if there would be any difficulty in transferring cars from one road to the other, and they distinctly told him, as long as the switching charges were paid, there would be no question about the transferring of cars, and he would get all the cars required to fill the order, and the shipments would be delivered as promptly as if they were being handled by the first carrying road. He states at the time the embargo was placed, there was in transit on the Canadian Northern Railway for Canadian

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Pacific Railway points forty-eight cars, which, in consequence of the embargo, had to be unloaded on Canadian Northern Railway team tracks, and hauled to the north-west end of the city. He also states under the present arrangement, unless all of his shipments were handled in Canadian Pacific equipment, he cannot properly supply his customers for the reason, he often orders, say twenty cars to be loaded at the pit intended for delivery at Canadian Northern private sidings, and before the arrival of the shipment, his customers who have private sidings on the Canadian Pacific Railway often run out of material, or come to him with a hurried order, and if he desired to divert the shipments to these customers, he could not do so if they were not loaded in Canadian Pacific cars.

The situation is that the shippers desire to ship to private sidings. Mr. Bury, in the quotation already given, does not contest this right. The shipper located on the Canadian Northern, shipping to a private siding on the Canadian Pacific, should not be subjected to loss and damage because the Canadian Pacific is endeavouring to recover its cars. Whatever may be said as to the justifiability of the Canadian Pacific acting as it did, if it had cars on the Canadian Northern lines available at points of shipment for movement to private sidings in the Canadian Pacific terminals, it is apparent from what has been said, that while there were Canadian Pacific cars on the Canadian Northern lines, they were in no sense immediately, or even proximately, available at the sand pit.

The limitation of the movement on this inter-line traffic to Canadian Pacific cars alone is discriminatory, and should forthwith be removed.

THE CHIEF COMMISSIONER and Commissioners MILLS and GOODEVE concurred.

ANIMALS AT LARGE.

KRENZENBECK v. CANADIAN NORTHERN R. CO.
(13 W.L.R. 414.)

District Court of Saskatchewan, McLorg, J. February 19, 1910.

RAILWAYS (§ II D 6—71)—*Animals Killed on Track—Duty to Fence—Unenclosed Lands—Dominion Railway Act, secs. 254, 294—"At Large" on Owner's Lands—Negligence—Pleading—"Not Guilty by Statute"—Other Defences—Reference to Sections of Statute—Amendment.*

The plaintiff resided and his stable was on the north-east quarter of a certain section of land, and he had a lease of the south-west quarter through which the defendants' railway ran, and both quarter sections

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were used by the plaintiff as pasture. There was no fence on the south-west quarter. On a morning in March, the plaintiff, as was his custom, led his horses out of the stable to feed, and they proceeded to the south-west quarter where they usually grazed, and eventually crossed the railway track to the south side, and were there when a train passed in the afternoon. When the horses saw the train, they started to run home, crossing the track in front of the train, which was running about twenty-five miles an hour, on a fairly straight track, in daylight. One of the horses, having crossed the actual track, got into a cut, and, stumbling over the wire brace of a telegraph pole, fell in between the engine and the tender, and was killed. It was on account of the depth of the cut and the snow that the horse could not escape but was compelled having once started in it to follow the track:—

Held, that there was no liability on the defendants to fence, the locality being one in which the lands on either side were not enclosed and either settled or improved: Dominion Railway Act, sec. 254.

Held, also, that, the animal having been killed on the property of the defendants, and there being no evidence of the existence of any highway, the burden was on the defendants, under sec. 294 of the Railway Act, to shew that the animals were at large through the negligence or wilful act of omission of the owner; and they had satisfied this onus by shewing from the plaintiff's own evidence, that when the horses were let out of the stable, they could go anywhere they wished—that no restraint was imposed on them, and no care taken to see that they did not go directly to the railway track.

Whether cattle are "at large" or no, depends upon whether they are under restraint or control, quite irrespective of whether they are on their owner's lands or not.

Review of the authorities.

If, however, the animals were not "at large" in this case, sec. 294 did not apply, and the plaintiff had no cause of action because the defendants were under no liability to fence.

Semble, that, upon the evidence, the injury might have been averted by more care on the part of the defendants' servants; but that was immaterial because the defendants owed no duty in respect of cattle trespassing on their property, in the circumstances of this case.

The defendants, in addition to pleading "not guilty by statute," pleaded a number of other defences, but, no leave to do so having been obtained, they were not considered: Rule 113, Judicature Act.

The statement of defence was also insufficient in not stating the sections of the special Act relied on; but an amendment was permitted in this respect.

ACTION for damages for the loss of a horse killed in the defendants' railway.

A. L. McLean (Humboldt), for the Plaintiff.

A. M. McIntyre (Saskatoon), for the Defendants.

February 19, 1910. MCLORG, Dist. Ct. J.:—The statement of claim alleges that the plaintiff is the occupier of the S. E. 28-37-23 west of the second principal Meridian; that the defendants' railway runs through this land; that the defend-

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ants had not fenced the right of way; that on the 28th March, 1909, a horse of the plaintiff, of the value of $250, was killed on the right of way running through this land by one of the defendants' trains; that there was negligence on the part of the defendants, in not fencing and in allowing snow to accumulate on the right of way in such quantities that the horse was unable to escape and was compelled to run in front of the train for a considerable distance, and in doing so was overtaken and killed; and further that the defendants were negligent in not whistling and ringing the bell and slackening speed or stopping the train while the horse was on the track.

The defendants, in addition to pleading "not guilty by statute," pleaded a number of other defences, but, no leave to plead these having been obtained, I refused to consider them, holding that such defences were an infringement of Rule 113, Judicature Act.

This pleading referred only to the Act as follows: "By statute, Revised Statutes of Canada, 1906, ch. 37, Public Act," and is, I think, clearly deficient in not stating the sections of the special statute relied on as permitting the act complained of. English Order XIX., Rule 12, and Order XXI., Rule 19, prescribe this, and that the year of the reign shall be stated. These orders are in force here by virtue of sec. 15 of ch. 8, and sec. 44 of ch. 9, of the Statutes of Saskatchewan of 1907. See also *Van Natter* v. *Buffalo and Lake Huron R.W. Co.*, 27 U.C.R. 581; and *Winterburn Farm Co. v. Edmonton, etc., R.W. Co.*, 7 W.L.R. 815.

In the former case, however, an amendment of a still more serious character was allowed, even after trial, on terms of payment of costs, and I propose to allow this also on similar terms.

The sections to be pleaded are secs. 254, 294, 295, 306, ch. 37, R.S.C. 1906. This amendment will allow the specific question argued, and as to which evidence was given, to be determined.

I find the following facts:—

The plaintiff resides and his stable is on the N.E. of sec.

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28-27-33; he has also a lease of the S.W. quarter, which corners it; the railway track runs through this S.W. quarter, and both quarter sections were used by the plaintiff as pasture land.

There is no fence on the S.W. quarter.

On the morning of the 28th March, about 8 o'clock, the plaintiff, as was his custom, let his horses out of the stable to feed, and they proceeded to the S.W. quarter, where they usually grazed, eventually crossing the railway track to the south side, and were there when the train causing the accident came along about 3 o'clock in the afternoon.

When the horses saw the train, they started to run home, crossing the track in front of the train, which was running about 25 miles an hour, on a fairly straight track, in daylight.

Seven horses were there, and six got across safely, but the seventh, having crossed the actual track, got into a cut, and shortly after, stumbling over the wire brace of a telegraph pole, fell in between the tender and engine, and was killed.

The evidence satisfies me that it was on account of the depth of the cut and the snow that the horse could not escape, but was compelled, having once started in it, to follow the track.

At the conclusion of the plaintiff's case, the defendants moved for a nonsuit, on the ground that the plaintiff had failed to prove any negligence on the part of the defendants, and had failed to prove their liability to fence, and on the ground that the evidence established that the horses got at large through the negligent act of the plaintiff.

I refused the nonsuit pending an examination of the authorities.

This case differs in a material fact from any cited to me or that I have been able to find, in this respect, that these horses were where they lawfully might be until the accident occurred. In all the cases except one that I have found, the animals wandered off the plaintiff's land and got to the railway either from some highway or through some other person's land, and it may with some degree of plausibility be argued, the horses not being trespassers, and the Act having provided that the fact

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that no person being in charge of them shall not of itself destroy the plaintiff's remedy, he should be entitled to recover for this loss.

Now, in the first place, I think it must be clearly conceded that there was no liability on the defendants to fence. Section 254 of the Railway Act provides that the company shall not be required to erect or maintain fences whenever a railway passes through a locality in which lands on either side are not enclosed and either settled or improved—that is the case here, the land not being enclosed—unless the Railway Board otherwise order or direct; and no such order or direction was produced. Section 294 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—

294. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found and the pound-keeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

3. If the horses, sheep, swine or other cattle of any person which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases other-

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wise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover.

And sec. 295 provides that "no person whose horses, cattle, or other animals are killed or injured by any train shall have any right of action . . . If the same were so killed or injured by reason of any person" doing any of the acts specified in clauses (*a*), (*b*), (*c*), (*d*), and (*e*).

Section 294 applies, unless the plaintiff comes within the provisions of sec. 295. All the clauses of sec. 295 refer to fencing and gates, and consequently are not applicable in this case. Clauses (*a*), (*b*), (*c*), and (*d*) distinctly refer to fencing and gates; and "suffering the same to enter upon any railway," in clause (*e*), has received a similar meaning in *McLeod* v. *Canadian Northern R.W. Co.*, 18 O.L.R. 616.

Now, if this horse was at large under sec. 294, the plaintiff having proved that the animal was killed on the property of the defendants there being no evidence of the existence of any highway, they are *primâ facie* liable under the Act, and the burden of proof is on them to shew that the animal got at large as above stated.

The evidence on which the defendants rely to establish this proposition is that of the plaintiff. He testified that his horses were shut in the stable at night and let out each morning at 8 or 9 o'clock; that they used to come home at night; and that when so turned out they could go anywhere they wished.

Now, is this equivalent to their getting at large through the negligence or wilful omission of the owner? It involves this

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proposition, that, though the horses could, if they wished, go elsewhere, still as a matter of fact they were where they lawfully might be, grazing on their owner's land, but were, nevertheless, wrongfully at large.

It is evident, however, that no restraint was imposed on them, and no care taken to see that they did not go directly and immediately on to the railway track.

A reference to the authorities seems to shew that these animals were at large, and under circumstances that release the company from liability. In *Murray* v. *Canadian Pacific R.W. Co.*, 7 W.L.R. 50, the treatment of the animals was very similar. The learned Chief Justice there points out the duties of the owner. He says: "Now, in this country, as elsewhere, railways have been built and are in operation, and they are a source of danger to cattle and horses running at large. The statute does not intend that the railway companies shall be insurers against any accident that may occur by reason of their trains. Some duty is cast upon the owner of all animals that are likely to be placed in danger by reason of these trains; they are to take reasonable precautions to prevent them getting at large so that accidents may not happen to them, and, if they do not take such precautions, and accidents happen to such animals, the owner has got to abide by the consequences." *Phair* v. *Canadian Pacific R.W. Co.*, 9 W.L.R. 202, is to the same effect.

In *Becker* v. *Canadian Pacific R.W. Co.*, 5 W.L.R. 569, the animals were actually in a fenced, or at any rate partly enclosed, pasture, from which they escaped through some means not shewn, and it was held that, as against the company, there was a duty cast on the owner to take reasonable precautions to keep his horses in confinement or under control, and that "it was the wilful or deliberate act of the plaintiff in putting the animals where he did that was the cause of their getting at large . . . and therefore, they were at large through the negligence or wilful act or omission of the plaintiff, and thus came within the exception which excuses the company."

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To the same effect was the opinion of the majority of the Court in *McDaniel* v. *Canadian Pacific R.W. Co.*, 5 W.L.R. 564.

In *Clayton* v. *Canadian Pacific R.W. Co.*, 7 W.L.R. 721, Phippen, J.A., states: "Where an animal deliberately placed in a field, with an open space to the highway, is left to its own inclinations, and chooses, as it may, without restraint, to walk abroad, it is, as a matter of law, quite as much at large through wilful act, as if originally turned loose upon the road."

It seems to me from these authorities that whether cattle are at large or no, depends on whether they are under restraint or control, quite irrespective of whether they are on the plaintiff's land or not.

But it was contended by the plaintiff that these animals were not "at large" and the case of *McLeod* v. *Canadian Northern R.W. Co.*, 18 O.L.R. 616, was strongly relied on as supporting this proposition.

In that instance, as here, the plaintiff's land adjoined the railway but the land was fenced and the horses escaped through a gap in the fence that the defendants had left open.

The Chancellor, discussing the question (which arose under the present Act), says (p. 620): "This enactment applies to 'animals at large' and it would seem to me not aptly expressed if it is intended to relate to animals grazing or feeding at will in the field of the owner adjoining the track." And again: "The inherent meaning, as shewn by the words 'at large,' used expressly or by implication, throughout and in each of the subsections, restricts it to the case of 'animals at large.' The case now in hand of cattle on the premises of the owner adjoining the track is not expressly provided for anywhere in the new statute as revised. The negligence of the owner provided for by the section is when his animals get at large, or are at large, and do not cover and are not meant to cover the case of an owner using his pasturing land and field in the usual manner, for the purpose of feeding and keeping his cattle." And at p. 622, he says: "The defence of negligence does not arise upon the facts; the plaintiffs were using the field as owners or

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occupiers lawfully. They had the right to turn out their horses there to feed and stay, though they were aware of the gap in the company's fence."

In *Yeates* v. *Grand Trunk R.W. Co.*, 14 O.L.R. 63, Britton, J., holds that sec. 237, sub-sec. 4, has no application "to the case of animals getting upon the railway from an adjoining field or enclosure, but applies only to animals at large upon the highway or otherwise at large."

In both these cases, it will be observed that there is this vital distinction; the animals were not turned loose as in this instance, but were put in a field, where there was of necessity some sort of control over them.

In *McSloy* v. *Smith*, 26 O.R. at p. 511, occurs the following passage: "I cannot admit that cattle feeding in the owner's enclosure or shut up in his stable could be held running at large within the meaning of the usage and the law, whenever they might happen to escape from such stable or enclosure into the neighbouring grounds." This is quoted from *Ives* v. *Hitchcock*, Drap. R. at p. 257. And in *Ibbottson* v. *Henry*, 8 O.R. 625, Wilson, C.J., held that within the terms of the by-law, sheep could not be held to be running at large. "They were upon private, unenclosed property . . . and a boy was in charge of them while grazing." And at p. 634, O'Connor, J., said: "Being in charge of a person capable of taking care of them . . . they were not running at large, or, as it is otherwise expressed, they were not 'turned loose.'"

Now, I think these horses were, to use the above expression "turned loose;" they could go where they pleased, and were under no one's control; the fact that they did actually stay on the plaintiff's land till the accident does not seem to me to alter the case. The one moment they might be on his land; the next moment on the company's.

But, if I am wrong in this conclusion, and these animals were not "at large" but "at home," then sec. 294 does not apply, and the plaintiff still has no cause of action, because there was no liability on the company to fence.

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In *McLeod* v. *Canadian Northern R.W. Co.*, the plaintiff recovered by virtue of sec. 427, sub-sec. 2, on the express ground that the company were bound to fence and had not done so.

It was contended, however, that in any event the company should be liable, because, by the exercises of due care and discretion, the accident need not have occurred; in other words, they were guilty of contributory negligence.

This phase of the case has given me some difficulty, because I note that in *Murray* v. *Canadian Pacific R.W. Co.*, the learned Chief Justice draws attention to the fact "that there was no evidence of any negligence on the part of the company:" p. 53. And, again, in *Fair* v. *Canadian Pacific R.W. Co.*, it is stated: "There is no allegation of negligence on the part of the defendants." And from these observations the inference would appear to be that, if that were proved, it would alter the case.

I cannot, however, discover where such liability would arise. It would not arise at common law, because, *quoad* the company, the cattle were trespassers. In *Tillett* v. *Ward*, 21 Q.B.D. 17, Lord Coleridge states: "Now, it is clear as a general rule that the owner of cattle . . . is bound to keep them from trespassing on his neighbour's land, and, if they so trespass, an action for damages may be brought against him, irrespective of whether the trespass was or not the result of his negligence." And Stephen, J., says: "As I understand the law, when a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbours."

It cannot arise because they did not fence, because there was no liability on them to do so.

A statutory right of action is given under sec. 294, which is taken away if it be shewn that the animals got at large through the plaintiff's negligence. If that is so, how does the question of contributory negligence arise?

The question is discussed in the following cases: *Bourassa* v. *Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 41; and *Clayton* v. *Canadian Northern R.W. Co.*, *ib.* 355.

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I must say, however, that this branch seems to me to bear hardly on the plaintiff, because, though, in view of the law as I understand it, I have made no finding of fact on the question of contributory negligence—it being unnecessary to do so—if I were driven to it, I am of opinion under the evidence that the injury could have been averted by more care on the part of the company's servants.

The evidence of the engine-driver and fireman as to slowing down the train was contradicted by two other witnesses, one an independent one, and the fact that the horse got across the track, and was galloping by the side of it, indicates to me that, had the train been materially slowed down or stopped, the accident could have been averted. The evidence is that when the accident actually occurred, the train was stopped in a length of 60 feet or thereabouts.

In view of my conclusion on this branch, I have been disposed to allow the defendants no costs, but, after consideration, I have changed my mind, because, if the question of contributory negligence affords no defence at law, the plaintiff had no right to bring the defendants to the Court at all, and must bear the costs of doing so.

The action will be dismissed with costs.

WILKINSON v. GRAND TRUNK R. CO.

(Unreported.)

County Court of Simcoe, Ontario, Wismer, J. December 12, 1911.

RAILWAYS (§ II D 6—71)—*Animals at Large—Wilful Act or Omission of Owner—Defective Fences—Railway Act, sec.* 294(4).

Action to recover the value of cattle found killed on the defendant's railway.

The plaintiff's cattle escaped by knocking down or jumping over a fence of insufficient strength and height from one pasture field to another, and from there got through the highway fence part of which was constructed of brush with poles; thence along the highway, got over the cattle guards at the crossing and were killed by a passing train.

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The plaintiff's son admitted that said cattle had got out to the highway more than once through the fences which he had fixed at different times in different places after they had got out.

Held, that the cattle got at large through the wilful act or omission of the plaintiff by reason of his fences both of the pasture field and at the highway being insufficient and insecure and he cannot recover their value from the defendant.

M. B. Tudhope, for the Plaintiff.
W. E. Foster, for the Defendant.

December 12, 1911. WISMER, JJ., Simcoe Co.:—In this action at the trial I intimated that I would find as a matter of fact that the plaintiff's cattle were found killed on defendant's railway and upon the finding the plaintiff should be entitled to recover unless it could be shewn that the animals got at large through the negligence or wilful act or omission of the plaintiff. These cattle along with others about twenty, had been kept in a pasture on the plaintiff's farm and had escaped from the pasture to the highway, and from the highway to the railway over the cattle guards at the railway crossing. The whole question then is, how did they escape from the pasture and was it through any negligence or wilful act or omission on the part of the plaintiff. The plaintiff in his evidence said that he found the fence had been knocked down, that a part of the panel had been knocked down leaving a gap of about ten feet, and that it was low after the top rails had been knocked off. This was where they got out of the pasture into other fields of the plaintiff from which they got through to the highway. The plaintiff described the fence of the pasture as being a rail fence and pretty good, about as good as most fences around, and the fence between his field and the highway as pretty fair except the piece made of brush with poles. The son of the plaintiff said the cattle had got out through the fences to the highway more than once and that he had fixed the fences at different times in different places after they had got out. He said the cattle shoved the top rails off and then got over. He also said since the accident, he and his father went along and put rails on where

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needed both at the place where the cattle got out and at other places where the cattle had got out before. A witness for the plaintiff, Charles Fells, said the fences were reasonably good but not first-class. This witness also said it was not windy that day, that is the day the cattle got out. He was at a raising that day and had reason to know that it was not windy.

James Flurette gave evidence, being called on behalf of the defendant. He swore he met the plaintiff after the accident and that the plaintiff told him the animals had got out through the brush fence and that he had intended to fix it but had neglected to do so. This the plaintiff denies, but I think he is mistaken because it is just likely what he would say, it being, in my opinion, the fact. I believe the witness Flurette, however, because he did not deny certain facts that were adverse to the defendants, but unhesitatingly admitted them. I refer to certain indications of the railway land shewing where the steer had been dragged inside of the cattle guards on the defendants' land. If he would admit a fact like that against his employers the defendants, it is not likely he would make up the statement as to what the plaintiff said to him.

A statement was put in by the defendants which had been signed by the plaintiff making certain admissions as to the state of the fences. I may say that this statement seems to me to be in accordance with the facts and circumstances as admitted by the plaintiff and his son in their evidence at the trial. Now it becomes necessary to determine whether or not the above resume of the evidence discloses such negligence or wilful act or omission on the plaintiff's part as to disentitle him to succeed in this action.

Becker v. *Canadian Pacific R.W. Co.,* reported at 7 Can. Ry. Cas. 29, is instructive as to the duty of the owner to take reasonable precautions to keep his horses in confinement.

In *Bourassa* v. *Canadian Pacific R.W. Co.,* reported at 7 Can. Ry. Cas. 41 Q.R. 30 S.C. 385, the Court held where certain colts broke through a chain fastened in the gateway, the

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gate having been removed for the winter season, and escaped to the highway and thence to the railway and were killed that the railway company were not liable.

In *Laporte* v. *Canadian Northern Quebec R.W. Co.*, 8 Can. Ry. Cas. 137, the plaintiff's horses escaped from their pasture by jumping over a fence of insufficient height and thence to the highway and railway—it was held railway not liable.

In *Lacelle* v. *C.P.R.*, the Court held that because fences were insufficient plaintiff could not succeed.

In the case of *Armour* v. *Grand Trunk R.W. Co.*, 12 O.W.R. 927, Chief Justice Falconbridge, notwithstanding the jury's findings in favour of plaintiff entered a judgment for the defendant. This was where the horses of the plaintiff had been left in a barnyard enclosed by certain wires, the fence having been removed. Apparently the learned Chief Justice was of the opinion that this was a case in which the fence or wire was so insecure as to amount to negligence. This judgment, however, was reversed by the Divisional Court, but the reasons for such reversal are not given. I gather, however, from what little is reported that the Divisional Court were of the opinion that the jury's findings covered the point as to the negligence or non-negligence of the plaintiff and that the trial Judge, and the Divisional Court were bound by the findings.

In the County Court of the County of Simcoe, the case of *Tracey* v. *Grand Trunk R.W. Co.*, was tried before me with a jury. Certain horses of the plaintiff had been kept in the barnyard enclosure, the gate to the highway had been removed for the winter and in its place bars had been placed, apparently as far as the plaintiff's evidence went, quite securely. The horses, however, escaped by knocking down or breaking through these bars, ran along the highway, passed through the gate of the station yard to the railway track and were killed by a train. On these facts a jury held that the plaintiff had been guilty of negligence and judgment was entered for the defendants.

In considering these cases it must not be forgotten that the

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Railway Act prohibits the running at large of animals upon the highway within one half a mile of the railway crossing and therefore it is incumbent upon the plaintiff to be careful and take such reasonable precautions as may be necessary to keep them from straying on the highway.

In the light of the cases referred to I cannot find that the plaintiff was reasonably careful in keeping up his fences so that they were ordinarily and reasonably sufficient to keep his cattle in. If this had been the only time they had got out through those fences the case would have been different. The cattle repeatedly got out, not only through the fences of the pasture field, but also through the fences at the highway. It might have been expected that either the highway fences or the pasture field fences would have been sufficient to prevent their escape. There was no wind to blow the fences down and the cattle were not breachy and the only conclusion one can come to is that the fences generally were so insecurely put up or had been so long neglected that the least push on the part of any of the cattle would knock them down.

It was only after the accident the plaintiff made any attempt to add more rails to the fence to make it secure. This fact alone shews that more rails were necessary. The descriptions "pretty good," "pretty fair," "reasonably good," "not first-class," used by the witnesses of the plaintiff, and the plaintiff's statement that the fence at the highway was "pretty fair *except the piece of brush with poles,*" (this was not even pretty fair) and the expression "good as most fences around" are not such descriptions as would impress one favourably as to the character and condition of the fences.

If the plaintiff and his witnesses cannot speak stronger than that about them there cannot be much to be said in their favour. The statement or admission to Flurette by the plaintiff that "the animals got out through the brush fence and that he had intended to fix it but had neglected to do so" would indicate that the plaintiff was quite aware of the poor state of his fences.

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I must find, therefore, that the cattle got at large through the negligence of the plaintiff by reason of his fences, both of the pasture field and at the highway being insufficient and insecure.

Judgment will be for the defendants, dismissing the action with costs.

BOUCHARD v. QUEBEC RY. LIGHT & POWER CO.

(*Q.R.* 41, *S.C.* 385.)

(Translation.)

Quebec Superior Court, Lemieux, A.C.J., Quebec. December 18, 1911.

RAILWAYS (§ II D 6—71)—UP-KEEP OF FENCES ALONG RIGHT-OF-WAY—ANIMALS KILLED WHILE WANDERING ON TRACKS—FENCES IN BAD STATE OF REPAIR—RAILWAY ACT, SEC. 252, 254, 294(4), 295—9 & 10 EDW. VII. CH. 50, SEC. 8, 9.

Railway companies who do not maintain their fences and gates in the condition provided by law, are at fault and liable for the loss of animals who thereby gain access to the tracks and are killed.

December 18, 1911. LEMIEUX, A.C.J.:—September 22, 1910, a mare belonging to Bouchard, the plaintiff, valued at $250, was killed, during the night, on the defendant's line of railway, by one of its trains.

Bouchard brought an action against the company to recover the value of the mare, alleging that the accident was due to the company's negligence in not having, upon the Lessard's land, where the mare was in pasture, proper gates to assure the safety of animals.

The company pleaded, substantially, that it had erected fences and gates along the whole length of its right-of-way, according to law; that it had taken all possible means to prevent the accident, which had been due to plaintiff's own fault.

It has been proved that the mare in question had not been in the habit of jumping; on the contrary, she had been gentle and quiet.

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The day before the accident, the mare had strayed upon said Lessard's land, adjoining Bouchard's, and, with Lessard's consent, had been left to pasture there. Lessard's land is crossed by defendant company's right-of-way.

The evidence has proven conclusively that the gates, along the right-of-way, across Lessard's farm, were neither sufficient, nor proper, to prevent cattle and other animals from entering upon the line of railway. The gates were faulty, were old, and could not remain closed, in fact they could be easily opened by the wind and by animals. The hinges and fastenings were too weak to hold the gates closed and to prevent them from opening by themselves, or from being swung open by the wind or by any animals scratching themselves against them.

This kind of gate is old and out of date, and, upon certain parts of its right-of-way, the company has replaced them by modern gates of iron construction.

The defects in the gate were visible and apparent and could have been easily remedied, if the company had taken the necessary steps. The evening before the accident, Lessard, senior, who appears to have been the last person to have passed through the gate, closed it as much as it was possible for him to do.

The plaintiff's mare, as well as Lessard's horses, evidently entered upon the defendant company's right-of-way by passing through this gate, because on the following morning, at 5 o'clock, the plaintiff and Lessard found it in a leaning position, and sufficiently open from top to bottom to allow an animal to pass through it.

Horses' tracks were found and followed from the gate to the line of railway and even to the spot where the mare was injured and found in a dying condition. It is admitted that the mare was struck by a locomotive, and that the injuries she received required her destruction.

Employees of the company admitted seeing two gates open on a farm, without stating that it was Lessard's farm and without taking the trouble of determining whose farm it was.

They add that they closed these gates. Evidently, they

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were not those upon the Lessard farm, as the following morning, the gate at Lessard's was found hanging down and half open.

Section 294, sub-section 4, chapter 37 of the Revised Statutes of Canada—The Railway Act—amended by 9 & 10 Edw. VII. ch. 50, section 8, contains the following provision: "When any horses . . . at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, . . . be entitled to recover the amount of such damages against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent. . . ."

This statutory provision creates a presumption of fault against the company. It was thus interpreted in *Dube* v. *Temiscouata R.W. Co.*, May 31, 1911, Court of Review at Quebec. See *Mathieu* v. *The Quebec R.W., Light & Power Co.*, 37 Q.R. S.C. 164. The company has in no manner proved that the animal was at large through the negligence or wilful act or omission of Bouchard, or of Lessard, who might be considered as the agent of Bouchard and the custodian of the mare.

On the contrary, it has been established that the animal had been placed in the pasture, and that the gate in question had been closed as much as it was possible to do so.

Section 295 of the Railway Act (ch. 37, Revised Statutes of Canada), amended by 9 & 10 Edw. VII., ch. 50, sec. 9, provides: "No person who suffers damage proveable under section 4 of section 294 of this Act, or by reason of the company failing to comply with section 254 of this Act, shall have any right of action against such company for such damage if it is caused by reason of any person, . . ." The defendant company has not proved and has not attempted to prove that the accident was caused by any person whatsoever.

The accident was solely due to the neglect of the company to

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comply with sections 252 and 254 of the Railway Act, which read as follows:—

"252. Every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway for farm purposes. . . ."

"254. The company shall erect and maintain upon the railway,—(b) swing gates in such fences at farm crossings of the minimum height of four feet six inches on each side of the railway, with proper hinges and fastenings: Provided that sliding or hurdle gates, constructed before the first of February, one thousand nine hundred and four, may be maintained."

Section 254, sub-section 3.—"Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway."

It was the neglect of the company to maintain the gate in question in a condition sufficient and proper to prevent animals from getting on its right-of-way which is the cause of the accident.

Our conclusion is that the company is liable for the injuries received by the mare, and that the plaintiff has the right to recover the amount of damages suffered, proved to be $250, with interest and costs.

Taschereau, Roy, Cannon, Parent & Fitzpatrick, for the plaintiff.

Pelletier, Baillargeon & Alleyn, for the defendant.

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ROWE v. QUEBEC CENTRAL RAILWAY.

Quebec Court of Review, Tellier, Dunlop and Beaudin, JJ. March 22, 1912.

1. RAILWAYS (§ II C—25)—FENCES—BREACH OF STATUTORY DUTY—LIABILITY.

A railway company which fails to maintain such fences and gates, as are required by the Quebec Provincial Railway Act, commits a breach of duty and will as a result be presumed responsible for any damages caused to animals escaping on to its right of way unless it can rebut absolutely the statutory presumption that it is responsible for the killing of the animals on the track.

[*Canadian Pacific R. Co.* v. *Carruthers*, 39 Can. S.C.R. 251, and *Rogers* v. *G.T.P.R. Co.*, 2 D.L.R. 683, specially referred to.]

INSCRIPTION in Review from the judgment of the Superior Court for the district of St. Francis, Demers, J., rendered on October 1, 1910, condemning the company-defendant to pay $150, value of a mare, belonging to plaintiff, killed by one of defendants' engines.

The appeal was dismissed.

Plaintiff alleged two grounds of action: (1) That the gate at the farm crossing by which the mare got from the pasture upon the track was not furnished with proper fastenings as required by art. 6606 R.S.Q. 1909 (5171 R.S.Q. 1888); (2) that by the exercise of proper caution by defendants' employees the accident would have been prevented.

Defendant pleaded the gate was a "proper sliding gate, commonly known as a hurdle gate, with proper fastenings," as and for such hurdle gate; that a horse was killed but through no fault of its own, but through that of plaintiff.

The trial Judge found for the plaintiff on the ground that the gate was not furnished with proper fastenings as required by statute.

A. S. Hurd, K.C., for defendant-appellant, urged that as the gate was a sliding gate the proper fastenings were the upright posts at either end of sufficient length and weight and that a hook and staple or chain and padlock are not necessary for such a hurdle gate, although necessary for a swing gate. Appellant relied on *Lambert* v. *G. T. R.*, 7 L.N. 4, where the Court of Review confirmed a judgment dismissing an action similiar to the present one.

C. W. Cate, K.C., for plaintiff-respondent, relied on *Vernon* v. *G. T. R.*, M.L.R. 2 S.C. 181, where it was held that the erec-

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tion of slide gates which are supported and held in position merely by their own weight is not a compliance with the statute.

The unanimous judgment of the Court was delivered by

BEAUDIN, J.:—Article 6606 of the Revised Statutes of Quebec 1909, obliges every railway company to erect and maintain at its own costs and charges, on each side of the railway, fences with sliding gates, commonly called hurdle gates, with proper fastenings, and paragraph 3 declares that until these fences and gates are duly made the company shall be responsible for all damages which may be done by their trains, motors, cars, carriages or engines to cattle, horses or other animals on the railway. There can be no doubt as to the absence of hurdle gates with proper fastenings and, although the company may have been right in thinking they were sufficient, the presumption is against the company in the event of an accident as it is impossible to know what would have occurred if the law had been carried out. The company disobeyed a statutory disposition and this suffices to make it guilty of a fault from a legal point of view: see Abbott on Railways, page 366.

The proof seems to establish conclusively that plaintiff's brother shut the gate when the mare was brought to the pasture at 9 a.m., and that it was still closed at 11 a.m., when he went to dinner. It is true that the position of the gate after the accident shews that it must have been opened, but there is no evidence to shew that the mare did not pass through this opening and that she didn't open the gate herself. The legal presumption is against defendant and defendant has not been able to rebut this presumption.

See *Rogers* v. *Grand Trunk Pacific Railway*, 2 D.L.R. 683, 48 Can. L.J. 155; *C.P.R.* v. *Carruthers*, 39 Can. S.C.R. 251; *Huot* v. *Quebec Central*, 21 Que. S.C. 437.

Appeal dismissed with costs.

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PARKS v. CANADIAN NORTHERN R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. May 22, 1911.

Railway Company—Liability for Animals Killed on Track—Railway Act, R.S.C., 1906, ch. 37, sec. 294, sub-secs. 4 and 5—Fences—Construction of Statutes—Negligence or Wilful Act or Omission of Owner of Animals Getting at Large.

The liability of a railway company, under sub-sections 4 and 5 of section 294 of the Railway Act, R.S.C. 1906, ch. 37, for damages in the case of animals at large killed or injured by a train is not limited to territory where the company is by section 254 obliged to erect suitable fences, and the company can only escape such liability by shewing that the animals got at large through the negligence or wilful act or omission of the owner or his agent or the custodian of such animals or his agent.

The Railway Act of 1903 changed the law in this respect. *Bank of England* v. *Vagliano*, [1891] A.C., per Lord Herschell at p. 144, followed as to the interpretation of a statute intended to be a code of law on the subject referred to.

Arthur v. *Central Ontario R.W. Co.*, (1906), 11 O.L.R., 537; *Bacon* v. *Grand Trunk R.W. Co.* (1906), 12 O.L.R. 196; *Lebu* v. *Grand Trunk R. W. Co.* (1906), *ib.* 590; *Carruthers* v. *Canadian Pacific R.W. Co.* (1906), 16 M.R. 323, 39 S.C.R. 251, and *Becker* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 29, 5 West L.R. 569, followed.

The plaintiff had for two years been accustomed to turn his horses out of the stable in the winter to go without halters to a watering trough about fifteen yards away and driving them back to the stable after drinking. On the occasion in question, the plaintiff and his hired man were carrying out the usual routine when three of the horses after drinking, without their noticing it, walked off in the direction of the road instead of returning to the stable. When the fourth had finished drinking it started to walk after the others. The plaintiff observed this and immediately tried to intercept the horses, but the three escaped and, although the plaintiff followed them up at once and did his best to recover them, they eventually got on to the defendant's railway track and were killed by a train on a bridge.

Held, that the plaintiff was not guilty of negligence or of any wilful act or omission in the matter so as to disentitle himself to recover.

ACTION to recover damages for three horses killed on the defendants' railway.

The facts are set out fully in the following judgment given ing judgment given at the trial by

Nov. 2, 1910. MATHERS, C.J.K.B.:—This is an action, tried before me at Brandon, in which the plaintiff seeks to recover damages for three horses killed on the railway company's track. No witness who actually saw the horses killed by the defendants'

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train was produced, but, from all the circumstances, I have no hesitation in inferring that these animals were killed by the defendants' train and upon its railway track.

It is admitted that where the animals reached the railway, the company was under no liability to fence under sub-section 4 of section 254 of the Railway Act. The plaintiff's contention is that he is entitled to recover under sub-sections 4 and 5 of section 294. These sub-sections are as follows:—

"4. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence, or wilful act, or omission, of the owner or his agent, or the custodian of such animal or his agent."

"5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover."

The defendant contends that, as under section 254 and its several sub-sections, it was not compelled to fence, sub-sections 4 and 5 of section 294 do not apply, being applicable only to cases where the company is under a liability to fence.

It is well settled that at common law neither a railway company nor any other landowner was bound to fence against cattle belonging to others, but that each owner was bound to keep his cattle in.

As there was no common law duty to fence, if animals got on the track and were killed by a train the company was liable for the loss only if, in the act of killing, it had been guilty of common law negligence.

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Under the fencing provisions of the general Railway Act of 1888, it was uniformly held, both in England, Ontario and Manitoba, that the duty to fence was only as against the cattle of the adjoining owner, and that no such duty was owed to more remote owners. In case animals of an owner living at a distance from the railway, or not adjoining it, got on the railway track from adjoining lands, where they were without the owner's permission, and were killed, the owner could not recover: *Westbourne Cattle Co.* v. *Manitoba & North Western R.W. Co.,* 6 M.R. 553 and cases collected in MacMurchy's & Denison's Railway Law, 309.

In 1890, sub-section 3 of section 194 of the Act of 1888 was repealed and the following substituted for it:—

"3. If the company omits to erect and complete as aforesaid any fence or cattle guard, or if after it is completed, the company neglects to maintain the same as aforesaid, and if in consequence of such omission or neglect any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines; and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there."

This new sub-section unquestionably enlarged the right of owners of cattle running at large which had strayed upon property where they were trespassers. It was held in *Fensom* v. *Canadian Pacific R.W. Co.,* 4 Can. Ry. Cas. 76, that, under it, the owner of cattle killed while trespassing upon the property of the railway had only to prove that there was a by-law permitting cattle to run at large in the municipality and that they got upon the railway owing to defective fencing in order to recover from the railway.

In 1903, a new Railway Act was passed. Of this Act, section 199 commences with the heading: "Fences, Gates and Cattle

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Guards." The first two sub-sections relate to fencing and provide that the railway company shall maintain fences, gates and cattle guards, upon the railway, giving the dimensions; sub-section 3 provides that, whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled and enclosed, the company shall not be required to erect and maintain such fences, gates and cattle guards, unless the Board otherwise orders.

The amendment to section 194 of the Act of 1888, introduced by the Act of 1890, is here omitted.

Section 237 of the 1903 Act is headed "Animals at Large." The first three paragraphs relate to animals at large upon a highway within half a mile of the intersection of a highway with a railway at rail level, but paragraph 4 is new and is evidently intended to take the place of the amendment introduced by the Act of 1890. It has been taken out of the part of the Act relating to fences and cattle guards and placed under the sub-title "Animals at Large." This sub-section is carried into the revision as sub-sections 4 and 5 of section 294, with certain slight changes which are not material to this case.

The contention of the plaintiff is that now the question of fencing has nothing at all to do with the company's liability. Before 1903, if the railway company had complied with the law relating to fencing and animals broke through and were killed on the railway, the owner of the animals had no remedy unless he could shew that they were killed through the common law negligence of the company. On the other hand, if he could shew that the company's fences were not in accordance with the provisions of the Act, that would be a neglect of duty for which the company would be liable. The plaintiff's argument is that now, if animals get on the track in a locality where the railway company is bound to fence, and the railway company has fenced in accordance with the Act, the owner of the animals is not required to shew that the fence did not comply with the Act, and that the railway company cannot escape liability by shewing that it

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had fenced as required by the Act. He contends that under sub-section 4 of section 294 all the owner is bound to do is to shew that the animals were killed on the track by the defendant's train, and the company is liable and can only escape liability by shewing that the animals got at large through the negligence, or wilful act, or omission, of the owner or his agent or of the custodian of such animals or his agent; and that it makes no difference whether the animals reached the track at a point where the company was or was not required to fence.

Before considering the effect of the statute as it now stands it is important to see exactly what the law was just before this statute was passed. As before pointed out, under the Railway Act of 1888, companies were bound to fence their tracks except in unorganized districts. The duty to fence was only as against the abutting owner. If animals, trespassing on the land of an abutting owner, got thence upon the track owing to a defective fence and were killed, their owner had no remedy against the company. On the other hand, in the case of an abutting owner whose animals got upon the railway owing to the company's neglect to fence in a district where it was bound to do so, or to a defective fence, and were killed, the company was liable; but otherwise if the company's fence was in accordance with the statute.

In those districts where the company was not bound to fence, it owed no duty to do so either to adjoining owners or those more remote, and was consequently liable only for its common law negligence. The amendment of 1890 changed this condition of the law in only one respect; that is, it gave a right of relief to owners other than those whose property abutted on the railway in cases where a municipal by-law permitted animals to be at large upon the highway, and such animals got upon the lands of an adjoining owner and thence to the railway owing to the non-existence of, or a defect in, the railway fence. This amendment in terms only applied to localities where the company was bound to fence and made no change in the law with

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respect to localities where the company was not bound to fence. In such localities, the company still remained liable only for common law negligence. That was the condition of the law immediately before the Railway Act of 1903 was passed, and it is with the changes introduced by that Act that I have to deal. The alterations made in the revision of 1906, in so far as this case is concerned, are unimportant, and the sections to be considered are now 254 of the Railway Act as it appears in the Revised Statutes, relating to fencing, and section 294, sub-section 4 and 5, relating to animals.

At the time this Act was passed there were, and there still are, large areas in the Western Provinces traversed by railways that are neither settled and enclosed nor improved and enclosed, and through which it is not incumbent on the railway companies to fence. It is common knowledge that in these areas great numbers of both cattle, sheep and horses are raised and that many of them were and are annually killed by railway trains. It is also common knowledge that bitter complaints were made by the owners of such animals because the law gave them no remedy. This was the condition of affairs that existed when sub-section 4 of section 294 was originally passed. The question now is: Does that sub-section give any relief to owners of animals which have been killed in districts where the railway company is not required to fence, and if so to what extent?

In *Bank of England* v. *Vagliano* (1891), A.C. at p. 144, Lord Herschell laid down a rule of interpretation which was accepted by Perdue, J.A., in *Carruthers* v. *Canadian Pacific R.W. Co.*, 16 M.R., at p. 336, as applicable to this Act. Lord Herschell there said: "I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

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I accept that as the rule of interpretation applicable to this sub-section. There is a further rule of interpretation that seems to me equally applicable, namely, where the Legislature has changed the language of an Act, it is generally to be presumed that it thereby intended to change the law: *City of Ottawa* v. *Hunter,* 31 S.C.R. 10, and Craie's Statute Law, 133.

It has been held in Ontario in several cases that sub-section 4 does not apply to abutting owners whose land is enclosed for the reason that it applies only to animals "at large," and it cannot be said that an animal is at large in its home field, even although there is an opening in the fence through which the animal may freely pass upon the railway: *Yeates* v. *Grand Trunk R.W. Co.,* 14 O.L.R. 63; *Higgins* v. *Canadian Pacific R. W. Co.,* 18 O.L.R. 12, and *McLeod* v. *Canadian Northern R.W. Co.,* 18 O.L.R. 620.

It is also settled, I think, that the law as it now stands does give a remedy under certain circumstances to owners other than those abutting on the railway, where damage has resulted owing to the company's neglect to fence: *Carruthers* v. *Canadian Pacific R.W. Co.* 16 M.R. 323; 39 S.C.R. 251; *Arthur* v. *Central Ontario R.W. Co.,* 11 O.L.R. 537, and *Lebu* v. *Grand Trunk R. W. Co.,* 12 O.L.R. 590.

I think it may also be inferred from the decided cases, both in Ontario and Manitoba, that a railway company may discharge itself from liability by shewing that it has fenced as the law requires, although it cannot shew that the animals were at large through the negligence or wilful act of the owners: *Higgins* v. *Canadian Pacific R.W. Co.,* 18 O.L.R. 15, and *per* Perdue, J.A., in *Clayton* v. *Canadian Northern R.W. Co.,* 17 M.R. at p. 434.

This, however, leaves untouched the other question as to its liability in localities where it is not required to fence, and has not fenced. According to its plain language sub-section 4 is general in its application and applies to the unfenced as well as the fenced districts. The language used is much broader than that used in any previous enactment on the subject. The

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sub-section for which it is substituted was part of a section arranged under the sub-title, "Fences and Cattle Guards," whilst it is now part of a section having nothing to do with fencing under the sub-title "Animals."

It is clear from the language of this sub-section that owners of animals are expected to keep them from being at large, and if they are at large either through the negligence or wilful act or omission of the owner and get upon the railway and are killed or injured, their owner has no remedy. The Legislature, however, must be taken to have known that large numbers of animals are kept in those areas where railway companies are not by law compelled to fence. It did not intend that such animals should be allowed to roam at will, but it did know that animals will stray and will get at large without either the negligence or wilful act or omission of the owner, and knowing this it has said to the railway companies: "You are not compelled to fence in certain districts, but, if animals get on your tracks without the fault of the owner and are killed or injured by your trains, you must pay for them." Applying the rules of interpretation before mentioned, keeping in mind the evils existing when this legislation was enacted, and the tendency of Parliament to increase the liability of railways, this seems to me to be the clear meaning of the section.

I have seen no decision of a Superior Court covering this point. But the language used by the Divisional Court of Ontario in *Arthur* v. *Central Ontario R.W. Co.*, 11 O.L.R. 537, and *Bacon* v. *Grand Trunk R.W. Co.*, 12 O.L.R. 196, and by Harvey, J., in *Becker* v. *Canadian Pacific R.W. Co.*, 7 Can. Ry. Cas. 29, is wide enough to support the conclusion I have arrived at. The Chief Justice of Manitoba in *Clayton* v. *Canadian Northern R. W. Co.*, 17 M.R. at p. 432, so interprets this sub-section. A similar interpretation is placed upon it by Phippen, J.A., in *Carruthers* v. *Canadian Pacific R.W. Co.*, 16 M.R. at p. 329; 7 Can. Ry. Cas. 38 & 39. These last three opinions were expressed in dissenting judgments, but in none of the cases did the

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judgment of the majority deal with the question, nor was it necessary that they should do so, and in the British Columbia case Clement, J., expressly reserved his opinion upon it.

Phair v. *Canadian Northern R.W. Co.*, 5 Can. Ry. Cas. 334, was relied upon by the defendant. The jury found that the company was not required to fence in the locality in question, and Mr. Justice Street dismissed the plaintiff's action, but he did so, apparently, because he held that the animals had got at large through the negligence or wilful act of the plaintiff. His opinion seems to have been that fencing had something to do with the defendant's liability, but the jury having negatived the liability to fence, he then held the defendant not liable because the animals had got at large through the negligence of the owner, his opinion apparently being that the section does apply to cases where there is no liability to fence.

I was referred by counsel for the railway company to *Seigle* v. *Canadian Pacific R.W. Co.*, 13 W.L.R. at 627, the decision of a County Court Judge in British Columbia, wherein it is held that this sub-section does not apply where the company is not bound to fence. In the same valume, at p. 414, there is a decision of District Court Judge McLorg in *Krenzenbeck* v. *Canadian Northern R.W. Co.*, in Saskatchewan, in which the reverse opinion is expressed, although the decision went upon another point.

On the whole, I have come to the conclusion that Parliament intended this section to apply to districts where the railway is not bound to fence, and that, where an animal gets upon the railway in such a locality and is killed or injured, the railway company can only escape liability by shewing that it got at large through the negligence or wilful act or omission of the owner.

The question now arises: Were the animals at large through the negligence or wilful act or omission of the plaintiff? The facts, as I find them, are these: The plaintiff owned four horses, aged 4, 5, 6, and 7 years, which he used as his work horses. During a very cold day in February last, the horses being con-

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fined in plaintiff's stable, about half-past ten o'clock in the day, he and his hired man went to water them. The watering trough and pump were about 15 yards from the door of the stable, which was situate about 120 yards from the highway, there being no fence between. For two years he had been in the habit of turning the horses out of the stable to go to the watering trough and, after they had drunk, driving them back in. On this occasion he sent his hired man to take the halters off their heads and turn them loose while he went to the pump to pump water into the watering trough. The horses all came out to the trough and drank. Before the fourth had finished drinking, three of them had left the trough and, without his noticing it, had started to walk in the direction of the road, instead of returning to the stable. When the fourth had finished it started to walk after the other three. The plaintiff observed this and immediately endeavoured to intercept them, and he succeeded in turning back the one, but the other three trotted off ahead of him towards the road. He called to his hired man to secure the one, and he immediately started in pursuit of the others. His place was about three miles from where the railway crossed and the horses ran in that direction, he following. They went along the railway for a distance, and then left the track and went several miles south of the railway. He kept in pursuit during the whole day from 10.30 in the morning until dark at night, guided by their tracks and occasionally by seeing them at a distance. At dusk the horses were in a bluff some distance south of the railway. By this time he was completely exhausted from hunger and fatigue and he went into a house to get something to eat. While there he saw the horses starting north in the direction of his own place and he supposed they were on the way home. He was unable to follow them any further and he remained in this house all night. By 7 o'clock in the morning he started in pursuit again. He traced them from where he had seen them the night before until they reached the railway at a point about two miles from the bridge across the Assiniboine. He followed their tracks along the railway between the rails and

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when he reached the bridge he found their dead bodies mangled in such a way as to indicate that they had been struck on the bridge by a train.

The defendants contend that these animals were at large through the negligence of the owners, but I cannot agree with them. I cannot find negligence in the act of the plaintiff in allowing his horses to walk from the stable to the watering trough, 15 yards away, as he had been in the habit of doing for two years, while he and his man were in attendance to see that they returned to the stable again. Neither can I find that they were at large through the wilful act or omission of the plaintiff. Taking the halters off and turning them out of the stable was certainly wilful. But they were not then at large and could not be said to be at large until they had got away from him. He had no intention of permitting the horses to be at large. It cannot be said that they were at large through his wilful act when the fact is that they got at large against his will.

In my opinion, therefore, the plaintiff is entitled to recover. The plaintiff claims $1,000, and, upon the evidence, I think his estimate of damage is not excessive.

There will be a verdict for the plaintiff for $1,000 and costs of suit.

There will be a stay of proceedings after judgment entered for two weeks. If within that time an appeal is entered the stay will continue until it is disposed of.

Defendant appealed.

O. H. Clark, K.C., for defendant, appellant, cited: *Huist* v. *Buffalo & Lake Huron R.W. Co.,* 16 U.C.R. 299; *Ferris* v. *Grand Trunk R.W. Co.,* 16 U.C.R. 474; *James* v. *Grand Trunk R.W.C.,* 1 Can. Ry. Cas. 422; *McLeod* v. *Canadian Northern R.W. Co.,* 9 Can. Ry. Cas. 39; *Hunt* v. *Grand Trunk R.W. Co.,* 9 Can. Ry. Cas. 365; *Seigle* v. *Canadian Pacific R.W. Co.,* 13 W.L.R. 627; *McDaniel* v. *Canadian Pacific R.W. Co.,* 7 Can. Ry. Cas. 34; *Carruthers* v. *Canadian Pacific R.W. Co.,* 6 Can. Ry Cas. 15, 16 M.R. 323; *Biddeson* v. *Canadian Northern R.W. Co.,* 7 Can. Ry. Cas. 17; *Cortese* v. *Canadian Pacific R.W. Co.,* 6 W.L.R. 49, 7 W.L.R.

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392; *Atkin* v. *Canadian Pacific R.W. Co.*, 10 Can. Ry. Cas. 204, 18 M.R. 617; *Thompson* v. *Grand Trunk R.W. Co.*, 18 U.C.R. 92; *Cooley* v. *Grand Trunk R.W. Co.*, 18 U.C.R. 96; *Markham* v. *Great Western R.W. Co.*, 25 U.C.R. 572, and *Thompson* v. *Grand Trunk R.W. Co.*, 22 *A.R.* 453.

J. P. Curran, K.C., for plaintiff, respondent, cited *Carruthers* v. *Canadian Pacific R.W. Co.*, 16 M.R. 336; *Arthur* v. *Central Ontario R.W. Co.*, 11 O.L.R. 541; *Higgins* v. *Canadian Pacific R.W. Co.*, 18 O.L.R. 12; *Carruthers* v. *Canadian Pacific R.W. Co.*, 39 S.C.R. 251; *Hunt* v. *Grand Trunk R.W. Co.*, 18 M.R. 611; *Lebu* v. *Grand Trunk R.W. Co.*, 12 O.L.R. 590; *Bacon* v. *Grand Trunk R.W. Co.*, 12 O.L.R. 196; *Bourassa* v. *Canadian Pacific R. W. Co.*, 7 Can. Ry. Cas. 45; *Phair* v. *Canadian Pacific R.W. Co.*, 9 W.L.R. 202, and *Clayton* v. *Canadian Northern R.W. Co.*, 17 M.R. 426.

May 22, 1911. HOWELL, C.J.M.:—The Chief Justice of the King's Bench has, in his judgment, fully set forth the facts and has fully reviewed the statute and the authorities, and little is left to be said on the subject involved.

In the light of section 21 of the Interpretation Act, I agree that the rule of construction applied to a code of law by Lord Herschell in *Bank of England* v. *Vagliano* [1891] A.C. at p. 144, may well be applied to the Dominion Railway Act. The Interpretation Act declares that, where an enactment has received judicial interpretation and Parliament has re-enacted the legislation, it does not follow that the Legislature has adopted this interpretation or construction; and further, that former legislation, amendments and repeal are apparently not to be read to explain the present legislative intent, but this does not shut out the history of the legislation and the general trend of the legislative enactments on the subject at issue.

The statute permits a railway line to be forced through the country and to be operated at a high rate of speed in the midst of settlements and also through territory only sparsely occupied, and through parts not yet the home of man. One object of legis-

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lation is to protect the travelling public, and another to protect the property and rights of those living along the way and near this element of danger, and I would look for legislation to protect the property of the latter so that they may carry on their ordinary business without too great risk.

To secure the travelling public from accidents, and, no doubt, to guard this dangerous place, the company is required to fence and protect the track by section 254. Then, knowing the railway to be an element of danger to those along the way, the Parliament has declared by section 298 that the company, although not negligent, shall be liable for fires arising from their lawful use of their engines and trains.

Still further to protect the locality, and knowing that domestic animals do get out of hand and wander, Parliament, by sub-section 4 of section 294, has declared in clear language that, if domestic animals are killed by a train while at large, the company is liable, and sub-section 5 declares that, although cattle, when on a highway at the intersection of the railway line, must be in charge of a competent person, yet, if they are not so in charge and in any way get on the line and are killed, the company cannot defend on the ground that the cattle were not so in charge.

In my view of the law, sub-sections 4 and 5 declare that, if cattle are killed not at a crossing, the railway company is liable, whether it has fenced or not, provided the owner was not negligent under sub-section 4, and I take this to be the law laid down in *Carruthers* v. *Canadian Pacific R.W. Co.*, 39 S.C.R. 251.

Counsel for the defendants urge that all this legislation applies only to localities where by law the railway lines must be fenced and that the liability created by sub-section 4 of section 294 is restricted to the localities not affected by sub-section 4 of section 254.

It seems to me it might well be urged that the latter sub-section was passed for the purpose of relieving the company from any liability for negligence to the travelling public in not fencing

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in certain localities, and, although not required to fence while running through a sparsely settled country, yet the company must take care not to kill wandering animals and, if such are killed when at large without the neglect of the owner, the loss must be made good by the company. This view of the law will permit the western prairies to be settled and occupied near the railway lines. Parliament, requiring the owner to control and keep his cattle in hand, legislated as to property and civil rights in favour of the railway company, and, on the other hand, legislated in favour of those who might be injured by this element of danger in protecting them from loss by fire and by the killing of domestic animals.

If this is not the true view of the law, then we have this anomaly—if the company fence and guard their line they are liable for killing cattle, but, if they do not fence, they are not liable.

I agree with the trial Judge, and for the reasons given by him, that the defendants have not shewn that the animals were at large through the negligence, or wilful act, of the plaintiff.

Following the views which I expressed in *Clayton* v. *Canadian Northern R.W. Co.*, 17 M.R. 426, I think the defendants are liable and that the appeal should be dismissed with costs.

PERDUE, J.A.:—By section 254 of the Railway Act, the railway company is required to erect and maintain fences and cattle guards on each side of the railway, subject to the exception in sub-section 4, which declares that the company shall not be required to erect and maintain such fences and cattle guards where the railway passes through a locality in which the lands on either side of it are not enclosed and either settled or improved. A failure of the company to comply with this provision would, unless the company brought itself within the exception, render it liable to the penalty provided by section 427 of the Act: *Rex* v. *Grand Trunk R.W. Co.*, 17 O.L.R. 601. It might also be liable under sub-section 2 of section 427 to a private person directly injured by the omission: *McLeod* v. *Canadian Northern R.W. Co.*, 9 Can. Ry. Cas. 39.

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But, in addition to the liability to a penalty for failure to fence its railway, or to an action in certain cases for the omission, the company is, by section 294, sub-section 4, liable to the owner of any horses, etc., at large getting upon the property of the company and being killed or injured by a train, subject to the exceptions mentioned in section 295 and subject to the company establishing that the animal got at large through the negligence or wilful act or omission of the owner or his agent.

The learned trial Judge has found upon the facts that the animals in question in this action were not at large through the negligence or wilful act or omission of the plaintiff, the owner of them. I think the evidence justifies this finding.

None of the exceptions mentioned in section 295 apply in this case.

The defendant's contention is that sub-section 4 of section 294 only applies where the railway company is bound to fence. But this provision is widely separated in the Act from those which specifically impose upon the railway company the duty of fencing, while the sub-section in question is placed under another heading, "Animals," under which are found the clauses declaring the duties of owners of animals at large upon a highway near the intersection of a railway, the cases in which the owners are entitled to relief where animals, while at large, have been injured by the railway and the cases in which owners, by certain acts or omissions, deprive themselves of any right of action.

Sub-section 4 of section 254 relieved the railway company from the general liability to fence in localities to which that sub-section applied. This conferred immunity from the penalty or other right of action under section 427, to which it might be liable for breach of the main provisions of section 254. But by section 294, sub-section 4, there is imposed a liability to owners of cattle in certain cases, against which the railway company must take precautions to protect itself.

Section 294 stands apart from section 254 read in conjunction with section 427. The remedy afforded by section 254,

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coupled with section 427, is not co-extensive with that given by section 294. In *McLeod* v. *Canadian Northern R.W. Co.*, 9 Can. Ry. Cas. 39, it was held that, where horses escaped from the owner's pasture field lying along the railway, through an unfenced place or gap in the fence, the horses were not "at large" within the meaning of section 294 and that the section did not apply. The company was, however, held liable for a failure to fence under sections 254 and 427. In my view of the Act, the company may be excused from fencing under section 254 and still be liable under section 294.

CAMERON, J.A.:—This action is brought to recover the value of three of the plaintiff's horses, killed on the tracks of the defendant company in a district where the company was not liable to fence.

Under section 294, sub-section (4), of the Railway Act, the plaintiff made his case *primâ facie*, when he has established that the horses got upon the property of the company and were killed there by a train. To free itself from liability the company must, in defence, shew that the horses got at large through the negligence or wilful act of the plaintiff: *Arthur* v. *Central Ontario R.W. Co.*, 11 O.L.R. 543; *Bacon* v. *Grand Trunk R.W. Co.*, 12 O.L.R. 198; *Lebu* v. *Grand Trunk R.W. Co.*, *ib.* 592; *Higgins* v. *Canadian Pacific R.W. Co.*, 18 O.L.R. 12; *Carruthers* v. *Canadian Pacific R.W. Co.*, 16 M.R. 323, 39 S.C.R. 251.

The learned CHIEF JUSTICE OF THE KING'S BENCH, who tried this action, refused to give effect to this defence on the evidence, holding that the horses were not at large through the negligence or wilful act of the plaintiff. I can see no sufficient ground for interfering with this finding which seems to me unimpeachable. I have examined the cases referred to by counsel for the company on this point: *Thompson* v. *Grand Trunk R.W. Co.*, 18 U.C.R. 92; *Cooley* v. *Grand Trunk R.W. Co.*, 18 U.C.R. 96; *Markham* v. *Great Western R.W. Co.*, 25 U.C.R. 572, and *Thompson* v. *Grand Trunk R.W. Co.*, 22 A.R. 452. But it does not ap-

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pear to me that any one of them is applicable to the facts here before us.

But the defendant company raises the contention that sub-section 4 of section 294 must be read with section 254; that is to say that sub-section 4 is to be applied in those localities only where the company is bound to fence. But in the statute before us sections 254 and 294 appear separately, under different headings, without reference in the one to the other. I can find no direction or authority for limiting the clear and definite meaning of sub-section 4, either in the sub-section itself or elsewhere in the Act. The railway company is plainly made liable for horses at large killed upon the company's property, except where such horses are at large through the owner's negligence, and subject to the exceptions stated in section 295. To give effect to the defendant's contention, we must add to sub-section 4, in substance, this proviso: "This sub-section shall not, however, be in force in localities where the company is not required to erect and maintain fences under sub-section 4 of section 254 of the Act." This, I submit, cannot be done. We must give to the sub-section the meaning which its words convey and, as to what that meaning is, there can surely be no doubt.

I think the appeal must be dismissed.

RICHARDS, J.A., concurred.

Appeal dismissed.

NOTES.

The decision in *Parks* v. *Canadian Northern Ry. Co.*, 21 Man. R. 103, ante 247, is the first authoritative judgment upon a question of considerable difficulty, namely, whether a railway must, at its peril, keep cattle off its lands when they are at large under section 294 in cases where they are not obliged to fence for the purpose of keeping the cattle of an adjoining owner off under section 254. The case is one of some obscurity and the point has been mooted but not authoritatively settled in a number of decisions which are collected and reviewed in the judgment now reported and no useful purpose will be served by further passing upon them in this note.

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Primâ facie, the decision in the *Parks* case, if correct, discloses an absurdity. The owners of adjoining lands cannot recover for lack of fences if their cattle are killed on the track unless the lands in the locality are "enclosed and either settled or improved"; whereas the owners of cattle at large and therefore trespassing on those very lands may recover if the animals get on the track and are killed.

A mere *reductio ad absurdum* does not, however, invalidate our statutory law as we have a fondness for elliptical legislation and without further investigation it is not safe to assume that merely because the situation is anomalous, the owner of the cattle trespassing is not preferred over the owner of cattle who are lawfully at home on their own land.

To argue from first principles, the situation appears to be somewhat as follows: At common law there is no duty to fence against another's cattle. Each man must keep his own cattle in his own "close." If they escape and are injured on another's property their owner cannot recover unless the injury is wilful or malicious. No one may wilfully or maliciously maim or injure even a trespasser. That, however, is the extent of the liability and it does not render any man liable for a lawful user of his land for his own purposes even though trespassers are inadvertently injured. The running of trains is by statute a lawful user of railway lands, therefore inadvertent as distinguished from deliberate injury to cattle who get in their way, is not actionable. There being no duty, there is no legal liability. It is *damnum absque injuria.*

If, therefore, a railway company's liability to cattle at large is dependent upon fencing, a duty to fence must be found in the statute. There is, however, no such duty towards cattle at large where the lands through which the railway passes are "not enclosed, and either settled or improved." Section 254 is the only fencing section and the only liability for want of fences is for a breach of that section and is to be found in section 427. If, therefore, there is a liability for killing or injuring cattle at large, which get on the railway from a place where the company is not bound to fence, it must depend on some other factor than a duty to fence.

It may be that there is another factor present where cattle at large are killed or injured on the track. This factor is the mere presence of cattle on the track when they suffer or do in-

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jury and the duty appears to be not to keep them off the track by fences, but not to let them either be injured or do injury while on the company's property and a breach of this duty may render the company liable to the damages provided for by section 294 (4). In other words, there is no duty to fence where the lands in the locality are not enclosed and either settled or improved, and the cattle are at large, but there is a duty to prevent injury to or by cattle at large, and where we find breach of this duty then there is both *injuria* and *damnum*. This result is extraordinary when we contrast it with the more restricted duty towards owners of cattle not at large, but it appears to be the effect of the statute and appears also to be the true effect of *Parks* v. *Canadian Northern Railway Company*.

SHIRLEY DENISON.

AWARD—APPEAL.

CANADIAN NORTHERN PACIFIC R. CO. v. DOMINION GLAZED CEMENT PIPE CO., LTD.

British Columbia Supreme Court, Murphy, J. October 26, 1912.

1. COURTS (§ E—315)—RULES OF DECISION—PROVINCIAL COURTS FOLLOWING DECISION OF PRIVY COUNCIL—RAILWAY ACT (B.C.)—ANALOGY TO CANADIAN RAILWAY ACT.

   Under the British Columbia Railway Act upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where the principle applicable to such an appeal has already been laid down by the Privy Council under the Canadian Railway Act, 1888, which is, so far as material, identical in language with the British Columbia Statute, that construction will be adopted.

   [*Atlantic and North-west Railway Co.* v. *Wood*, [1895] A.C. 257, L.J. P.C. 116, applied.]

2. APPEAL (§ VII L—470)—REVIEW OF FACTS—AWARD—EMINENT DOMAIN —RAILWAY ACT (B.C.)—SCOPE OF APPELLATE JURISDICTION.

   Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the court will not supersede the arbitrators but will review the award as it would review the judgment of a subordinate court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law.

   [*Atlantic and North-west Railway Co.* v. *Wood*, [1895] A.C. 257, 64 L.J.P.C. 116, followed, under which a similar question under subsec. 2 of sec. 161 of the Canadian Railway Act, 1888, being sec. 168 of 3 Edw. VII. (Can.) ch. 58, was decided.]

3. APPEAL (§ VII L—470)—REVIEW OF FACTS—AWARD — RAILWAY ACT (B.C.)—FINDINGS, WHEN SUSTAINED—QUANTUM OF DAMAGES.

   Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages

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under eminent domain proceedings where conflicting views as to the quantum of damages were apparent but the estimate made in the award cannot be said to be unreasonable or manifestly incorrect, the findings of the arbitrators will not in that respect be disturbed, the arbitrators having seen and heard the witnesses and viewed the land in question.

AN appeal from the award of arbitrators fixing damages under eminent domain proceedings.

The appeal was dismissed.

J. N. Harvey, K.C., for appellants.

D. Armour, for respondents.

MURPHY, J.:—The principle applicable to this appeal has been laid down by the Privy Council in *The Atlantic & Northwest Railway Co.* v. *Wood*, [1895] A.C. 257, 64 L.J.P.C. 116, where the statute construed was, so far as is material, identical in language with the British Columbia statute under which these proceedings are taken. It is to the effect that it was not the intention of the Legislature that the Court should entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits on the facts as well as the law; that, in short, they should review the judgment of the arbitrators as they would that of a subordinate Court in a case of original jurisdiction, where review is provided for. I have read the evidence herein and whilst conflicting views as to the quantum of damages can be urged thereon, yet, in my opinion (mindful that the arbitrators saw and heard the witnesses and viewed the land in question), to use the language of the Court appealed from in the case cited, the estimate made in this award cannot be said to be unreasonable nor manifestly incorrect, and I do not feel warranted, therefore, by substituting my discretion for theirs to adopt an estimate of damages which might be open to equal criticism and even less defensible according to the evidence by which both they and I are bound.

The appeal is, therefore, dismissed.

Appeal dismissed.

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CARRIERS OF GOODS.

WILKINSON v. CANADIAN EXPRESS CO.

Ontario Divisional Court, Falconbridge, C.J.K.B., Riddell, and Lennox, JJ. November 14, 1912.

1. CARRIERS (§ III J 1—499)—SHIPMENT OF GOODS—EXPRESS COMPANY'S RECEIPT TO PARTY OTHER THAN THEIR CUSTOMER—SPECIAL CONDITIONS.

A person who forwards his railway baggage checks to an express company with instructions to take delivery of the baggage and reforward it by express may claim damages for its loss in transit while in their custody as upon the company's common law liability, and is not bound by a condition of a shipping receipt issued to the railway company on receiving delivery from it, purporting to limit the maximum liability of the express company in case of loss, where the contract evidenced by such shipping receipt is in terms made between the express company and the railway company only and its provisions were not communicated to the owner of the baggage.

[But see *Edwards* v. *Sherratt*, 1 East. 604; *Lohden* v. *Calder*, 14 Times L.R. 311; *Hayward* v. *Canadian Northern R. Co.*, 6 Can. Ry. Cas. 411; *Mercer* v. *C.P.R.*, 8 Can. Ry. Cas. 372.]

2. CARRIERS (§ III G 3—455)—SHIPMENT OF GOODS—STIPULATIONS LIMITING LIABILITY.

The fact that an express company is enabled by statute to make use of a special form of contract impairing, restricting, or limiting its liability does not prevent the company from contracting upon the basis of a more extended liability as upon its contractual rights at common law, although such special form has received the approval of the Railway Commissioners of Canada, exercising governmental powers of supervision over common carriers.

APPEAL by the plaintiff from the judgment of Winchester, Senior Judge of the County of York, in an action to recover $500 for the value of a magic lantern and slides alleged to have been lost by the defendants in transit, and for damages. At the trial judgment was awarded the plaintiff for $50 with costs up to payment into Court, and no set off allowed the defendants.

The appeal was allowed.

T. N. Phelan, for the plaintiff.

W. E. Foster, for the defendants.

RIDDELL, J.:—The plaintiff, a clergyman living in Aylmer, had a magic lantern outfit which had been carried on the G.T.R. to Stratford in a trunk as baggage. He left this in the baggage-room at Stratford: he went to Woodstock. From that city he wrote a letter to the "Canadian Express Company, Stratford,"

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instructing the Company to ship it from Stratford to Galt. The letter is not produced: but there is produced a letter written immediately after as follows:

"Canadian Express Co. Woodstock, June 5/11.
Stratford.

I, in my haste dropped my previous letter in the office forgetting to enclose the check of my box. Find it enclosed with this.

Yours, etc.,
T. J. Wilkinson."

The agent at the depot at Stratford for the defendants received these letters in due course of mail: he took the check to the G.T.R. baggage-room, paid 55 cents for warehousing charges, gave up the check, received the trunk, made out the usual receipt and gave it to the baggage-man who probably threw it into the waste paper basket. The receipt read "Received of G.T.R. (herein called the shipper) 1 box said to contain not given valued at not given 100 dollars addressed Rev. Wilkinson, Galt, which the Canadian Express Company herein called the Company agrees to carry and deliver upon the terms and conditions on the back hereof to which the shipper agrees and as evidence of such agreement accepts this shipping receipt. . . .

For the Company,
A. Jones Agent."

On the back were printed certain conditions of which the following seem to be material: "2. This agreement shall extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership . . . of the shipment. . . .

"3. The liability of the company upon any shipment is limited to the value declared by the shipper . . . If the shipper does not declare the value of the shipment, liability is limited to $50. . . ."

The trunk went astray and cannot be traced: the plaintiff sues for the value thereof, claiming $500: the defendants pay $50 into Court and claim that they are not liable for more. The trial Judge, Winchester, Co.J., gave effect to this contention, the plaintiff now appeals.

Much argument was addressed to us to induce us to hold that the special contract did not apply in the present case and

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several cases were cited, amongst them: *Lamont* v. *Canadian Transfer Co.*, 19 O.L.R. 291; *Corby* v. *G.T.R. Co.*, 23 O.L.R. 318, *James* v. *Dominion Express*, 6 Can. Rwy. Cas. 309; *McMillan* v. *G.T.R.*, 12 O.R. 103; S.C. 15 A.R. 14; *Grand Trunk R. Co.* v. *McMillan*, 16 Can. S.C.R. 543.

I do not think it necessary to decide that point because, assuming that the contract does apply, it does not bind the plaintiff. The language is the language of the Express Company—they say in so many words that in that contract "shipper" means the G.T.R.—and the contract is in terms binding upon the shipper and his privies. The plaintiff, for the purposes of the special contract is neither the shipper—that is the G.T.R.—nor a person in privity with him: the plaintiff is not, therefore, within the special contract at all. What has happened is that the defendants on being requested to carry certain goods for the plaintiff take it upon themselves to purport to carry them on a special contract with some one else.

They are liable in my view for the full value.

We are told that the Railway Board have approved of this form as the only form to be used. This must of course, be read as meaning the only form of contract "impairing, restricting, or limiting the liability of" the company: R.S.C. ch. 37, sec. 353—it does not mean that the company may not carry on its common law rights so long as no attempt is made to impair, restrict or limit its liability—e.g., there is nothing to prevent the express company agreeing to pay twice the value of the goods carried, the order of the Railway Board notwithstanding, and in this case what they have done is to take the plaintiff's goods as a common carrier and lost them, without limiting their liability to him.

The evidence justifies a verdict for $280 and I think the plaintiff should have judgment for that sum with costs here and below.

FALCONBRIDGE, C.J.K.B., and LENNOX, J., agreed in the result.

Appeal allowed.

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REX v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Scott, Stuart, Beck, and Simmons, JJ. June 29, 1912.

1. EVIDENCE (§ II J—305)—PRESUMPTION AS TO CONTENTS OF BOX—COURSE OF BUSINESS—DELIVERY TO CARRIERS—ABSENCE OF DIRECT EVIDENCE.

In the absence of direct evidence the contents of a box of military supplies was sufficiently shewn in an action by the Crown against a railway company for its loss, by the testimony of the officer in charge of the supplies, that he selected them from the general stores and turned them over to a person of excellent character, whose duty it was to box and ship them, and that the latter delivered a heavy box to the railway company, which receipted for it, and that such person could not be produced at the trial, as his term of enlistment had expired, and his whereabouts was unknown.

APPEAL by the Crown from the judgment of Harvey, C.J., presiding at the trial, whereby only nominal damages were awarded to the Crown for the loss of a box of militia supplies consigned from Calgary to Edmonton by an Ordnance officer.

The appeal was allowed and judgment directed to be entered for the value of the consignment, Simmons, J., dissenting.

Stanley Jones, for the Crown.

G. A. Walker, for the railway company.

SCOTT, J.:—This is an action in which His Majesty seeks the return of a box of militia clothing and supplies alleged to have been delivered to the defendant company at Calgary on the 18th June, 1910, for carriage to Edmonton, or for payment of $845.85, the value thereof, and $2.65, the amount of the freight charges paid thereon. The learned Chief Justice, who tried the action, while satisfied that a box was delivered by the Ordnance officer at Calgary to the defendant company there on that date, and that it was lost in transit, gave judgment for His Majesty for nominal damages only, giving as his reason for so doing that the evidence did not disclose what the box contained.

Theodore Boulangeau, the Ordnance officer for the district comprising this province, who resides at Calgary, and whose duty it was to look after military properties and supply them to the local militia, states that he received instructions to ship certain supplies to Lieut.-Col. Edwards at Edmonton for the equipment of his regiment.

These supplies, which were enumerated by the witness, and which were valued by him at $485.85, were selected and counted out by him in the store-room, ready to be packed and shipped,

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by one Ryan, who was then in charge of the store-room, and whose duty it was to pack and ship them. The latter made out a requisition for their transport by the defendant company, and afterwards assisted in loading them on the dray for conveyance to the freight sheds.

The box was delivered to the defendant company on that day, and a clerk in their freight department gave a receipt for it, specifying it as "one box of clothing," its weight being specified therein as follows, "said to be 417." The freight charged thereon at that time was $2.65, which was at or about the usual rate of freight for a package weighing 417 pounds from Calgary to Edmonton. Ryan, whose duty it was to pack the box, had been in the employment of the Militia Department for eighteen or twenty years. He subsequently left the service, his term of service having expired, and afterwards left the province. Boulangeau states that he never had any complaints to make as to Ryan's capabilities, never heard of any shipment going to another person by mistake, and that the supplies he had been sending out (presumably excepting this particular shipment) had reached the proper persons. What is shewn to be the ordinary routine of the stores department, which is a department of the public service, the long and apparently faithful and efficient service of the storekeeper Ryan, the absence of anything tending to cast suspicion upon him, the fact that he had nothing to gain by omitting to perform his duty upon that occasion, and the further fact that the defendant company acknowledged the receipt of a box of clothing, afford, in my opinion, reasonably sufficient evidence to justify the Court or a jury in assuming that the supplies referred to were packed by him in the box, and that they were therein at the time it was delivered to the defendant company.

I am, therefore, of the opinion that the appeal should be allowed with costs and judgment entered for the plaintiff in the Court below for $488.50 with costs.

STUART, J.:—This is not a case, as it appears to me, in which any law is involved at all. It is a pure question of inference of fact, where such inference is sought to be drawn from undisputed facts.

In such cases we have as much right as the trial Judge to draw what inference we please from the undisputed facts. Sitting here, then, as a judge of fact, I have only to say that I feel quite

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able to make the inference that the goods were placed in the box. They were put out all ready to be packed. Instructions were given to a man, shewn to have been for many years in the service and of excellent character, to put them in the box, and it was shewn to be his duty so to do. Then the box, with a weight of 417 lbs., was delivered to the defendants. There must have been something of very considerable weight in the box. I conclude that it was the goods in question; and I think the appeal should be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for $488.50 and costs of the action.

BECK, J.:—This is an action to recover against both defendants as common carriers damages for loss of a box of military clothing, etc., alleged to have been delivered to them for carriage. The case was tried by the learned Chief Justice without a jury.

At the conclusion of the plaintiff's case, the trial Judge dismissed the action as against the Pacific Cartage Company with costs, on the ground that the evidence satisfied him that the box, though received by the cartage company, had by that company been delivered, in pursuance of their obligation, to the Canadian Pacific Railway Company. There is no appeal from that portion of the judgment. The learned Judge, however, though finding that the Canadian Pacific Railway Company had actually received the box and had failed to deliver it, awarded the plaintiff damages against the Canadian Pacific Railway Company only to the amount of $1, and that without costs, because he was of opinion that there was no evidence to prove that goods of any value were contained in the box.

Against this decision and the amount of damages the plaintiff appeals.

Captain Boulanger was the Ordnance officer for military district No. 13, comprising the whole of the province of Alberta. The office and stores of which he had charge were at Calgary. He went about making a shipment to Lieut.-Col. Edwards, the officer commanding the district, who resided at Edmonton, of the following goods: 193 mess-tin covers, 286 haversacks, 6 waist-belts, 6 sword-knots, 28 serge frocks, 14 pantaloons.

The making of this shipment was in the ordinary course of his duties, which were, he says, "looking after the military properties, receiving them from headquarters (Ottawa) and contractors, and giving them to the local militia commanded by the officer commanding the district."

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He says that he furnishes all the military supplies for the militia in Alberta; that how he came to make this particular shipment was, that it was to be made to the officer commanding the district in the ordinary way to equip the 101st Regiment at Edmonton; that, as soon as the articles in question were received from Ottawa, they were packed in cases and shipped. The effect of the evidence as to his personal knowledge of the goods being packed and shipped is this: that he counted out the several articles in the room at the stores for the purpose of their being shipped, and that he left them lying on the floor ready to be packed; that it was then the duty of one Ryan, an official who then had charge of the stores, to pack them in a box. Ryan, who had been a faithful official of the Department for nearly twenty years, had left the service some time before the action was commenced, his term of service having expired, and his evidence was not procured. Then Captain Boulanger, in accordance with the established routine of his office, issued a transport requisition signed by himself. This requisition, under the heading "Pkgs.," had the figure "1"; under the heading "Stores & Clothing," the words "box clothing"; under the heading "weight lbs.," the figures "417."

It was Ryan's duty to weigh the box containing these articles, to mark the weight on the box, and to report the weight to Captain Boulanger, who, no doubt, got the weight of this particular box in due course from Ryan before issuing the transport requisition.

Ryan's next duty was to deliver the box to the Pacific Cartage Company for delivery to the Canadian Pacific Railway Company. It was the duty of one Ireland, a non-commissioned officer under Captain Boulanger, to accompany the box to the Canadian Pacific Railway freight shed, and to issue a shipping bill in triplicate for shipment of the box via the Canadian Pacific Railway to Edmonton.

A shipping bill covering the box, and signed by Ireland, is produced, as well as a similar one signed by the agent at Calgary of the Canadian Pacific Railway Company. The freight charges of the Canadian Pacific Railway Company for delivery of the box at Edmonton were estimated on a weight of 417 lbs., and paid through Captain Boulanger's office.

On this and some additional evidence, the learned Chief Justice held that the Pacific Cartage Company had discharged their duty by delivering the box to the Canadian Pacific Railway Company, and that the latter company were responsible for

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the non-delivery of the box. This particular box was the only box shipped from Captain Boulanger's office on the day the transport requisition and the shipping bills bear date. It is quite clear, to my mind, with much deference to the learned Chief Justice, that he ought to have found the Canadian Pacific Railway Company liable, not merely for the loss of the box, but of its alleged contents also.

In Phipson on Evidence, 4th ed., p. 87, it is laid down that to prove that an act has been done, it is admissible to prove any general course of business or office, whether public or private, according to which it would ordinarily have been done; there being a probability that the general course will be followed in the particular case. Similar propositions are to be found in the other standard books on evidence. The usual instances of the application of this general rule are those of the posting or delivery of letters. Phipson has the following example (p. 103):

> To prove the posting of a letter it is relevant to shew . . . that the letter was put in a given place, where all letters were regularly put for posting, whence they were always carried to the post by a servant: *Hetherington* v. *Kemp*, 4 Camp. 193; *Skilbeck* v. *Garbett*, 7 Q.B. 846; *Percy Supper Club* v. *Whyte*, 106 L.T.J. 308. In the first-mentioned case, it was held that the servant must be called, but in the others this was decided not to be necessary. In the last-mentioned case Channell, J., remarked that fifty years ago such proof, *i.e.*, without calling the servant, would have been wholly insufficient.

The last-cited case is not accessible to me, but as cited it appears to my judgment as supporting my opinion that, in the present case, it was not necessary to call Ryan, who was shewn to be a faithful servant and whose duty it was to have packed the various articles in question in the box, and who, if he failed to do so, cannot be supposed merely to have made a mistake, but must be supposed—contrary to a presumption which we ought to make—to have fraudulently and criminally substituted in the box some worthless material of approximately the same weight (as we are, by the use of our ordinary knowledge, able to estimate), and to have stolen the articles which he ought to have put in the box—articles, too, adapted only for special use.

On the general principle, therefore, that proof of a regular system of business is *primâ facie* proof that in a particular case the general system has been followed, I think there was sufficient evidence that the goods in question were packed in the box delivered to the Canadian Pacific Railway Company; and it seems to me that this evidence is entitled to additional weight

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in the present case, inasmuch as, it being established that the box came to the hands of the Canadian Pacific Railway Company, and was lost through their negligence, there is a presumption of fact that the articles contained in the box were not worthless, but of the value of such goods as might reasonably be supposed to be in it. This is, perhaps, the application in a mild form of the principle of the maxim, "*Omnia præsumuntur contra spoliatorem.*"

I should be prepared to go to this extent. Take as an example a large departmental store, with which some customers make a cash deposit, against which their orders are charged. Then suppose it were shewn that the regular custom in the departmental store was, that a clerk should take the customer's order, note it in a counter-check book, select the goods, note the prices to be charged, deliver a duplicate to the customer, then lay aside the goods in a special place to be wrapped up by another clerk, whose duty, after wrapping them up, was to address the parcel and deposit it in a large basket, from which it was the duty of another clerk to take all the parcels and distribute them to the proper delivery vans in charge of others, whose duty it was to deliver the parcels received to the addressees. With this system proved and the fulfilment of the duty of the first clerk only proved, then, if a particular customer was shewn on a particular day to have given but one order for certain goods, and on the same day to have received one parcel and only one from the store, and he gave no account of its contents, I should hold that he had *primâ facie* been properly charged with the amount of the order.

I see no difference in principle between such a case as that which I have suggested by way of illustration and the present. Though "fifty years ago" it might have been thought extravagant, it seems to me to be a proper and reasonable application to modern methods of an acknowledged principle.

I would, therefore, for the reasons which I have tried to explain, allow the appeal with costs, and direct judgment to be entered for the sum of $488.20, with interest at 5 per cent. from the commencement of the action, with costs.

SIMMONS, J. (dissenting):—This is an action by the Crown against the Canadian Pacific Railway Company for the value of a box of military supplies delivered to the defendants at Calgary for shipment to Edmonton.

The Chief Justice, before whom the action was tried without a jury, found negligence against the defendants as common

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carriers, but also found that the plaintiff had not furnished proof of the contents of the box; and, therefore, assessed the damages at $1; and from this judgment the plaintiff appeals.

Theodore Boulangeau, Ordnance officer at Calgary, gave evidence to the effect that his duties were to look after the military properties, receive them from headquarters, and give them out to the local militia, and that Mr. Ryan was conducting the stores at the time. Mr. Boulangeau did not see the packing of the supplies in the box, as this was done by Mr. Ryan, who has since left the service, and is not now in the province. Mr. Boulangeau made out a requisition containing a description of the goods which were to be shipped. He did not see the goods packed, but saw them lying on the floor, and his personal knowledge of the contents of the shipment ended there.

It is contended by the appellant that there is a presumption of fact that Mr. Ryan, who was a public officer, would, in the ordinary course of his duty, do what his superior officer, Mr. Boulangeau, requested him to do, and a further presumption that he was honest, and was not a party to any fraud in the matter of packing the box.

It is contended that these are presumptions which furnish an exception to the general rule that the best evidence of which the case in its nature is susceptible should always be produced. These presumptions are apparently in the same class as those in which secondary evidence is admitted as to declarations in discharge of duty in the ordinary course of business or professional employment.

Taylor on Evidence, 9th ed., ch. 7, gives a very complete and able discussion of the application of this principle. At p. 455 the author says:—

> Of late years great disinclination has been evinced by the Courts in extending the principle of allowing entries which have been made in ordinary course of business to be admitted as evidence, further than the decisions have already carried it.

The case before us is one in which the extension of the principle of assuming that any one, whether a public officer or not, performed the duties of his office, would impose a hardship upon the defendants. A carrier has no opportunity of ascertaining the kind or the value of a box or parcel which has been lost. This is a class of evidence which is peculiarly within the sole control and knowledge of the opposite party; and, when damages are claimed by him, he should surely be under an obligation to produce the best class of evidence available to him. The plaintiff

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in this action made no attempt to get the evidence of Ryan, who alone could give positive evidence that the goods were actually placed in the box. There is no suggestion that the plaintiff made any attempt to get his evidence, nor is there any suggestion that it was inconvenient to obtain it, beyond the fact that Ryan was in a neighbouring province.

Rule 118 of the Judicature Ordinance provides:—

> It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the plaintiff's statement of claim, or for the plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact, of which he does not admit the truth, except damages.

It is then a question as to the shifting of the onus of proof. The plaintiff has established a *primâ facie* case as to negligence against the defendants upon proof of delivery of the box to them and their acceptance of the same for carriage to Edmonton.

When the plaintiff seeks to establish the amount of damages, the evidence of this is peculiarly within his control and knowledge and cannot be met in any way by the defendants, further than by cross-examination of the plaintiff's witnesses. It seems to me that the case is one of a class in which the plaintiff should produce the best evidence reasonably available before the onus is shifted to the opposite party; and I would dismiss the appeal with costs.

Appeal allowed; SIMMONS, J., *dissenting.*

LESSARD v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court. Trial before Simmons, J. July 17, 1912.

1. CARRIERS (§ III C—388)—SHIPMENT OF PERISHABLE GOODS IN BOX CAR —SHIPPER'S OMISSION TO ORDER REFRIDERATOR CAR AT HIGHER RATE.

> Where butter is shipped in a box car and the weather is such that a refrigerator car is necessary to keep it in good condition, and the plaintiff's agents, the consignees, caused a delay in delivery by failing to pay the freight charges, the defendants are not liable for injury to the butter where an unreasonable time is not occupied in making delivery.

SIMMONS, J.:—The plaintiffs shipped a carload of butter on April 12th, 1911, over the defendant's railway from Edmonton

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to Calgary, in a box freight car. Alfred Denis, a member of the plaintiff firm had charge of the shipping and says he telephoned the defendant company at Edmonton and he understood the rate was 21 cents, so he paid it, and when the car got to its destination he found he had made a mistake. He says he paid according to what they told him at the freight office. The bill of lading put in by the plaintiffs, has a space noted as follows:—

> If charges are to be prepaid, write or stamp here to be prepaid

and no writing appears in this space. Below this is a space on which appears:—

> Received $52.14 to apply on prepayment of the charges on the property described hereon.

The butter was invoiced to the Crown Feed & Produce Company at Calgary, at 30 cents per pound, although Mr. Denis says the market price of butter at Edmonton then was 35 cents per pound. He gives as a reason for invoicing to Calgary at a lower price that he had not time to attend to the sale of the butter in Edmonton. Mr. Denis says he told the agents of the defendant company at Edmonton to have the car rushed. He says he did not think it was necessary to ship in a refrigerator car. Mr. Kennedy, a witness for the plaintiff, and at that time an employee of the Crown Feed & Produce Co., says:—

> A close car with the heat beating on the roof would turn any butter. It would take about a week to turn it.

He also says the weather was very warm at that time. The temperature records put in by plaintiff confirm his statement as to the weather conditions. He says he did not think it wise to ship butter in a box car in April. Mr. Denis says he did not expect any warm weather in April.

The car arrived in Calgary on the night of the 17th or morning of the 18th of April and was placed by the defendant on delivery track 6 where the Crown Feed & Produce Company usually had their cars placed for delivery. The Crown Feed & Produce Company say they verbally told the defendant on the 18th to place the car on the Swift Packing Co.'s siding while Burns, freight clerk in defendant company's freight office, says he got these instructions on the 19th of April. The car was not placed on the Swift siding till the 21st and the Swift Company commenced unloading when the car checker stopped them as there was a balance of $47.40 due for freight. The unloading ceased about 5 p.m. on Friday and Mr. Cahil, manager of Swifts,

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tried to get the Crown Feed & Produce over the telephone and get them to adjust the freight so that unloading might proceed. He was unable to do so on Friday afternoon and on Saturday the officials of the defendant company took up the matter with the Crown Feed & Produce Co. and finally Mr. Campbell, in charge of car checking went to their office and got a cheque for the balance of freight and released the car and unloading proceeded on Saturday afternoon and was completed. The members of the Crown Feed & Produce Company and their assistant Mr. Kennedy, gave evidence of enquiries made by them on the 18th, 19th and 20th as to this car and also as to instructions given by them to the defendant's officer in the freight department to have the car placed on the Swift siding. I cannot give very much weight to this class of evidence in view of their actions after the car was placed on the Swift siding. The bill of lading sent by their principals at Edmonton to them indicated on the face that all freight charges had not been paid. When their attention was called to the necessity of paying the freight in order to allow unloading to proceed they did not pay the freight and the defendant company sent an official of their own to the Crown Feed & Produce Company, and only after some wrangling with them he secured from them their unaccepted cheque for the freight and he released the car, although he need not have done so until he secured acceptance of their cheque. It is admitted by plaintiffs' own witnesses that unloading was delayed a whole day on account of the unpaid freight charges.

The sections of the contract of the carrier printed on the back of the bill of lading and which have a bearing on this case are 1, 3 and 8 which are as follows:—

1. The carrier of any of the goods herein described shall be liable for any loss thereof or damages thereto except as hereinafter provided.

2. The carrier shall not be liable for loss, damage, or delay to any of the goods herein described, caused by the act of God, the King's or public enemies, riots, strikes, defect, or inherent vice in the goods, or the act or default of the shipper or owner; for differences in weights of grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights when the elevators are not operated by the carrier, unless the weights are evidenced by government certificate; the authority of law or by quarantine. For loss, damage or delay, except where cartage is to be performed by the carrier or its agents, caused by fire occurring after forty-eight hours (exclusive of legal holidays), after written notice of the arrival of said goods at des-

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tination or a port of export (if intended for export and not covered by a through bill of lading) has been sent or given, the carrier's liability shall be that of the warehouseman only. Except in case of negligence of the carrier (and the burden of proving freedom from such negligence shall be on the carrier), the carrier shall not be liable for loss, damage or delay occurring while the goods are stopped and held in transit upon the request of the party entitled to make such request. When in accordance with general custom, on account of the nature of the goods, or at the request of the shipper, the goods are transported in open cars, the carrier (except in case of loss or damage by fire, in which case the liability shall be the same as though the goods had been carried in closed cars) shall be liable only for negligence, and the burden of proving freedom from such negligence shall be on the carrier.

The owner or consignee shall pay the freight and all other lawful charges accruing on said goods and if required, shall pay the same before delivery if upon inspection it is ascertained that the goods shipped are not those described in this bill of lading, the freight charges must be paid upon the goods actually shipped, with any additional penalties lawfully payable thereon.

The carrier shall not be liable for the act or default of the shipper or owner.

The defendants cannot be held liable because the owner chose to take the chance of shipping butter in a box car in April in the expectation that the weather would remain cool whereas the weather conditions became so warm as to cause injury to the butter. The plaintiffs' own agents, the Crown Feed & Produce Company, engaged in the same business, considered it unsafe to do so. The defendant company on request could have provided a refrigerator car, though at a higher rate.

The plaintiffs' own agents, the consignees, caused a delay of a whole day by failing to pay freight charges.

The plaintiff it seems to me must also fail on another ground. Counsel for plaintiff at trial endeavoured to locate the injury as having occurred between the 17th and 21st while the car was at Calgary through the failure of the defendant to place it on Swift's siding. I am not able to find on the evidence that the defendant company had any notice that the car was to be placed on the "Swift" siding prior to the placing of the car on No. 6 siding where the Crown Feed & Produce Company usually took delivery. The delay in the change from this siding to Swift's was primarily caused by the plaintiffs themselves. The defendant company had to move a car placed with many others at a

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time when plaintiffs say the yards were congested and get it in to a private siding. I am not able to say they were an unreasonable time in doing so.

The plaintiffs' action is dismissed with costs.

S. B. Woods, K.C., for plaintiffs. G. A. Walker, for defendant.

COMPENSATION.

ROBINSON v. CANADIAN NORTHERN R. CO.

Manitoba King's Bench, Macdonald, J. August 22, 1912.

1. DAMAGES (§ III L 2—244)—MEASURE OF COMPENSATION—REMOVAL OF SPUR TRACK BY RAILWAY.

The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which track, at small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard.

2. EVIDENCE (§ XII B—929)—SUFFICIENCY OF PROOF AS TO DAMAGES—REMOVAL OF RAILWAY SPUR—DISCREPANCY IN EVIDENCE AS TO COST OF HAULING COAL AND LUMBER.

The award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day.

3. CARRIERS (§ III I—476)—DEMURRAGE—WRONGFUL REMOVAL OF SPUR BY RAILWAY—LONGER HAUL—ELEMENT IN FIXING DAMAGES.

Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner.

APPEAL from the Master's report in the assessment and awarding of damages to the plaintiff.

The appeal was dismissed.

A. B. Hudson, for plaintiff.

O. H. Clark, K.C., for the defendants.

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MACDONALD, J.:—The facts are fully recited in the judgment of Mr. Justice Metcalfe, *Robinson* v. *Canadian Northern R. Co.*, 11 W.L.R. 578 (in appeal, 13 W.L.R. 8, 19 Man. L.R. 300, *Canadian Northern R. Co.* v. *Robinson*, 11 Can. Ry. Cas. 304, 43 Can. S.C.R. 387, and *Canadian Northern R. Co.* v. *Robinson*, [1911] A.C. 739, 13 Can. Ry. Cas. 412), and it is only necessary for me to review the findings of the Master on the various items on which he awarded the plaintiff damages.

There cannot be any doubt that the discontinuance by the defendant company of the spur track facilities for unloading and loading their material greatly increased the cost of the conduct of their business. With the use of this spur track the carloads were unloaded immediately opposite the shed and yards of the plaintiff. A carload of coal could be unloaded into the shed by one man in a day and a carload of lumber could be unloaded by a team and a man in one day or by two men with push carts in a day.

After the removal of the spur track the plaintiffs were obliged to take delivery of their goods on what the defendants called their team tracks, being public delivery sidings, and cars consigned over the Canadian Pacific Railway they had to unload from that company's team tracks, no transfer being made as was the case prior to the removal of the spur tracks. In this manner extra time was consumed in having to bring the goods from the car to the yard, something over a mile.

The first item settled by the Master and to which the defendants take exception is the allowance for the increased cost of handling coal.

There were 190 cars delivered to and unloaded by the plaintiffs to their sheds, 30 of which were placed on what is known as stub tracks, and the additional cost of unloading from these tracks the Master finds to be $5.00 per car, and one hundred and sixty cars were unloaded from wherever they could be found in the public delivery sidings, and the additional cost of taking delivery of these carloads the Master finds to be ten dollars per car.

The evidence shews that prior to the removal of the spur track facilities one man could unload a car of coal in a day and that after the removal of such facilities it necessitated the use of horses and teamsters to do the work of this one man; taking two teams and teamsters one day to unload a car, and the cost is placed at $5.50 for a team and teamster, and there

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is a further charge of one dollar per car for degradation caused by extra handling, thus making twelve dollars per car, for which the Master has allowed ten dollars, deducting the two dollars per car which would be the expense of a man unloading prior to the removal of the spur track.

The defendants object that this estimate of the extra cost is guess work and not based on any fact, and that in any event, the allowance according to the evidence of Mr. T. D. Robinson is one dollar per car in excess of what it should be. At page 95 of this evidence he says the wages were $5.50 per day for a team and a man, but at page 110 he says that the charge of the Canadian Northern Transfer Co. was five dollars per day or fifty cents per hour. He claims, however, that his teams were worth more as they could get better work out of them, and Mr. Harstone's evidence tends to corroborate this, and the Master having so found, I do not feel disposed to interfere with his finding.

The method of estimating the extra cost suggested and urged by the defendants I cannot adopt. Were there no evidence other than by shewing the actual number of miles travelled back and forth from the yard to the cars, that method might have to be resorted to, and in such a case a liberal allowance would have to be made for the many turns and delays incident to such a method; but, to my mind, there is evidence sufficient to justify the finding of the Master.

For the extra cost of handling of wood, the Master allows the sum of two thousand four hundred dollars, being six dollars a car for four hundred cars. Plaintiffs claimed 415 cars. 400 is allowed. It is claimed that 27 cars were unloaded from stubs 1 and 2, and as these stubs were opposite the plaintiff's yard no allowance should be made. There is no evidence, however, that they were opposite, and in reducing the number of the cars the Master has made provision for the possibility of an over-allowance in this item. It is evident from a glance at the plan Ex. 3 (printed case) that teams would be required to unload these cars from stubs 1 and 2 and the reduction by the Master in the number of the cars would even up the overcharge.

There is also evidence by which the Master based his computation as to damages on extra handling of lumber, the maintenance of Wall street yard and the allowance for demurrage, and from the most careful analysis of the evidence and read-

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ing of the exhibits, I have come to the conclusion that the Master's findings should not be disturbed, and I dismiss the appeal with costs.

I also dismiss the counter-appeal with costs.

Appeal dismissed.

CONTRACT—CONFLICT OF LAWS.

GRAND TRUNK R. CO. v. MARLEAU.

(Q.R. 21 K.B. 269.)

(*Translation.*)

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Gervais, and Greenshields, ad hoc, JJ. Montreal, November 25, 1911.

MASTER AND SERVANT (§ II A—35)—WORKMEN HIRED IN QUEBEC TO BE EMPLOYED IN QUEBEC AND ONTARIO—ACCIDENT, FOR WHICH EMPLOYER IS LIABLE, HAPPENING IN ONTARIO — LAW APPLICABLE THERETO—JURY TRIAL—APPEAL.

Held, 1. Common law liability, in cases involving *delict* or *quasi-delict*, is governed by the *lex loci regit actum*. Hence workmen hired in Quebec to be employed in Quebec and Ontario, who are injured by the positive act or by the fault of their employers in the latter province, have no remedy except under the provisions of its laws.

2. When the evidence shews that the foreign law does not admit of the remedy relied upon by the plaintiff, and upon which a verdict has been given in his favour by the jury, he must be nonsuited, *non obstante veredicto*, a new trial being ineffective.

[*Marleau* v. *Grand Trunk Ry. Co.*, Q.R. 38 S.C. 394, 12 Can. Ry. Cas. 149, reversed in part.]

THE judgment appealed from, which is reversed upon the second point, namely, that in the suit at bar, the law of Ontario, as proven, does not provide against the liability of the appellant, is reported in 38 Que. S.C. 394.

November 25, 1911. ARCHAMBEAULT, C.J.:—The present appeal involves a railway accident in which the plaintiff was injured. The 10th March, 1909, the line of the Grand Trunk Railway was blocked with snow, following upon a heavy storm, and respondent, a section foreman in the employ of the company, was instructed to leave his usual work and oversee the clearing of the line of railway between Coteau station and Hawkesbury. The track-clearing train consisted of a snow-plough, a locomotive, a van and a flanger. The respondent was

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to act as conductor of the snow-plough. The conductor of a snow-plough not only superintends the clearing of the line, but he controls the movements of the train. The locomotive driver must take his orders from him as to the speed of the train and as to stops, because a clear view of the line is denied him owing to the snow-plough which is coupled on in front of the locomotive.

The accident which resulted in injuries to the respondent happened upon the return journey from Hawkesbury. A short distance from the station, the tracks of the Grand Trunk are crossed by those of the Canadian Northern. This crossing takes the shape of a St. Andrew's cross or of a lozenge. It thus goes by the name of "Diamond Crossing." No train should pass that point unless a signal, indicating that the line is clear, has been given. The signal in use is a white flag. Under the regulations of the Grand Trunk Railway Company, "white" means "safety," and implies that the crossing can be made without danger (art. 327). When the track-clearing train, in charge of respondent, approached the "Diamond Crossing," the white flag was shewn and the train crossed. A little further on, on the Grand Trunk line, there is a freight yard. By virtue of an agreement between the Grand Trunk Railway Company and the Canadian Northern Railway Company, the trains of the latter company may run over the tracks of the Grand Trunk and enter the yard for the purpose of changing freight between the two companies. A switch, installed between the "Diamond Crossing" and the freight yard, enables Canadian Northern trains to go from its tracks to those of the Grand Trunk, and then to return to the Canadian Northern line. When a Canadian Northern train is on the Grand Trunk tracks, the switch remains open, and an employee is bound to station himself at that point, holding a red flag, to protect that train. . . . In addition to this signal, there is, at the same point, a fixed signal, known as a disc signal, because it has the shape of a disc. When the disc is closed, that is to say when the face of the disc is at right angles to the tracks, it means to stop. That is what the witnesses mean when they stated that the disc was "against" the train which wishes to pass. When, upon the day of the accident, the respondent's track-clearing train arrived at that point, after passing the "Diamond Crossing," the disc was at right angles to the line, and, consequently, the train should have stopped. Unhappily, it passed right through and six or seven

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hundred feet further on it came into collision with a locomotive of the Canadian Northern, which was backing down the line from the freight yard. The respondent was seriously injured by the collision; his left arm was crushed and it was found necessary to amputate it at the shoulder. He sues the Grand Trunk Railway and the Canadian Northern Railway for $10,500 damages, alleging fault and negligence on the part of the two companies.

The case was tried before a jury. The latter, by their verdict, found no fault on the part of the Canadian Northern Company and that the accident was solely due to the fault of the Grand Trunk Railway Company. The jury define this fault by "the giving a white flag signal clear the 'track' at 'Diamond Crossing.'"

This was the verdict of only nine of the jurors. The other three jurors were of the opinion that the Grand Trunk Railway was not liable.

The amount of damages allowed by the verdict was $7,500.

The Judge, who presided at the trial, gave judgment against the Grand Trunk Railway, in accordance with the verdict, but only for $2,068.94, for the reasons which I will refer to further on.

The company has appealed, and it asks us to grant a new trial or to nonsuit the plaintiff.

We are unanimously of the opinion that the verdict is against the evidence.

The jury attached an importance to the white flag signal which it certainly did not deserve.

That signal meant that the line was clear at the point of intersection and that a train could pass that point; but it did not mean that the line was clear beyond the crossing, and that the train could proceed with the warranty that there was no other train upon the same track.

It is true that the respondent states in his evidence that he understood the white flag to mean what the majority of the jury interpreted it to be. But his statement is not corroborated by any other witness.

Two witnesses for the company, Frederick Lamplough and Morley Donaldson, swear, on the other hand, that the signal in question was simply an indication that the train could make the crossing in safety.

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This theory is supported by the very words of the statute. Section 277 of the Act respecting Railways (R.S.C. 1906, ch. 37), declares that "No train or engine or electric car shall pass over *any crossing* where two main lines of railway . . . . cross each other at rail level, . . . until a proper signal has been received . . . from a competent person or watchman in charge of such crossing . . . From the moment the statute declares that a train shall not pass over any crossing, until a signal that the way is clear has been given, it is clear that the signal means that the line is clear at such crossing. By further providing that such signal should be given by a watchman in charge of such crossing, the statute clearly indicates that the watchman is responsible for the crossing but has nothing whatever to do with any other part of the line. For, it is easily apprehended, a collision might occur at the crossing of two lines of railway, between two trains, one of which is running upon one line, and the other upon another line. The watchman is charged with the duty of preventing that.—No train shall pass over the crossing until the watchman has given the proper signal that no other train is in sight upon the other line of railway. That is what happened in the case at bar. The discharge of a duty, placed upon the Grand Trunk Railway Company by law, by its own regulations and common sense, could not create fault on its part. So it is, I repeat it, that we are of the opinion that the verdict is contrary to the evidence when it recites that the company caused the accident by giving the white flag signal.

But respondent does not rest his case upon this point alone. He claims that if the verdict on this point is against the weight of evidence, it is none the less true that the company is liable for the accident because the red flag signal was not given at the switch. As I have already stated, this red flag signal was supposed to be given whenever a Canadian Northern train was upon the Grand Trunk tracks. The jury were evidently not of this opinion, because they did not so express themselves, and, secondly, because they stated that the Canadian Northern Railway Company was not to blame, and it was that company which was under a contractual obligation to keep a man stationed at that point with a red flag. Furthermore, from the moment the element of fault recited in the verdict of the jury does not exist, we cannot sustain the verdict.

At the same time, it becomes necessary to examine this aspect of the case so that we may be in a position to decide whether

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we should grant a new trial, or give a judgment different from that of the Judge who presided in the trial Court. Article 488 C.P. declares that a new trial may be allowed when the verdict is contrary to the weight of evidence, and article 508 contains a provision whereby a judgment, different from that rendered by the trial Judge, may be given "when it is absolutely clear from all the evidence that no jury would be justified in finding any verdict other than one in favour of the party moving or inscribing." The effect of these two provisions is that if the respondent has any reason for claiming that the evidence shews that the Grand Trunk Railway Company is responsible for the accident, although it may not have been guilty of the fault recited in the verdict, we should allow a new trial; because, in that event even, the verdict of the jury was contrary to the evidence; but that if we arrive at the conclusion that the facts, as proven, establish that the company appellant is not responsible in law, it then becomes our duty to reverse the judgment and to nonsuit the respondent.

Let us therefore examine the question from this point of view. As I have already related, the accident happened near Hawkesbury. Hawkesbury and the place of the accident are in the Province of Ontairo. The trial Judge was, for that reason, of the opinion that the law of Ontario should govern the case. Respondent has not complained of this before us. At all events, we think that the learned Judge was right.

The trial Judge also decided that the case was not one under the Ontario common law, but that it came within the purview of the Workmen's Compensation Act of this province. Again, no objection was made before this Court as to the soundness of this ruling; and we take it for granted that the statute in question regulates the relations between the parties to the suit at bar. I should at once point out that there is little resemblance between the Workmen's Compensation Act of Ontario and our own statutory enactment upon the same subject. Our Workmen's Compensation Act has abolished responsibility from fault and replaced it with responsibility arising from employment. Under our common law, there is no responsibility without fault. Contrarywise, however, our Workmen's Compensation Act declares that responsibility attaches to employment. In that aspect of the question, every accident arising from employment or in the course of employment, involves responsibility for the employer, even in the absence of any

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evidence of fault on his part. If the Workmen's Compensation Act of Ontario was essentially the same as our own, the appellant company would undoubtedly be held responsible for the accident to the respondent in an amount of damages equal to that provided by the Act. But the Ontario Act was not intended for the purpose of replacing fault by professional risk. Its object is simply to suppress the theory of "common employment," in the cases laid down in the Act. Under the common law of England, which is that of Ontario, an employer cannot be held responsible for accidents to one of his employees which are occasioned by a fellow-workman. By an exception to the law, the Workmen's Compensation Act of Ontario, which is the reproduction of the Employers' Liability Act of England, concedes the same remedy against the employer, in the cases laid down, just as if the person injured had not been in his employ. See the remarks of Lord Bowen in *Re Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685. From this, it is clearly to be understood that our Quebec statute is an exception to the rule which attaches responsibility for fault; the Ontario statute is an exception to the theory of "common employment." It is well-known, of course, that our law does not give recognition to the theory of "common employment." With us, employers, and those who replace them, are liable, not only to third parties, but in addition to their workmen or foremen, for the damage caused by one to the other, in the execution of the work which they have been engaged upon together (4 Aubry & Rau, p. 760). In the cases it provides for, therefore, the effect of the Ontario statute is simply to assimilate the law of that province with the law of this province when the question is an accident caused to a workman by a fellow workman. Hence, under the Ontario common law, the Grand Trunk Railway Company would not be liable towards the respondent, because it is a case of "common employment." But, under the restrictive statute the company is liable, because the case is one which comes under the statute; provided, however, the other conditions required by the law of the province of Ontario exist.

This leads me to the examination of another point. Our law and the law of Ontario differ in another respect, which is of great importance in the case at bar. According to our law, in a case of common fault, the damages should be divided between the parties, in proportion to the fault of each. This is not the rule of the English common law, which is the law of Ontario.

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When there is fault on the part of both parties, the rule of the English law is stated to be that the party who was the determining and proximate cause of the accident is alone responsible. The rule has been clearly explained by Mr. Cline, a lawyer from Cornwall, who has been heard as a witness on behalf of the respondent. It reduces itself to this, that if it is impossible to say which of the two parties was proximately responsible for the accident, there is no remedy. I find this rule of the English law discussed, from every point of view and with great clearness, by Mr. Justice Lindley, in the case of *The Bermina,* 12 P.D. 89, judgment being delivered in 1887. These are the words he uses:—"The cases which give rise to actions for negligence are primarily reducible to three classes as follows: (1) A., without fault of his own, is injured by the negligence of B.; then B. is liable to A. (2) A., by his own fault, is injured by B., without fault on his part; then B. is not liable to A. (3) A. is injured by B. by the fault, more or less, of both combined; then the following further distinctions have to be made: (*a*) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B; (*b*) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B.; (*c*) if there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case, A. cannot, with truth, say that he has been injured by B.'s negligence. He can only with truth say that he has been injured by his own carelessness and B.'s negligence; and the two combined give no cause of action at common law." In another case of *Tuff* v. *Warman,* 5 C.B.N.S. 573, cited by Street, on "Legal Liability," page 137, the Judge told the jurors: "If both parties were equally to blame and the accident was the result of their joint negligence, the plaintiff could not recover; and if the negligence or default of the plaintiff was in any degree the proximate cause of the accident, he could not recover, however great may have been the negligence of the defendant."

If we apply the principles or rules which we have just cited to the case at bar, it is necessary to say that: if the accident was the result of the negligence of the company alone, it is responsible; if the accident was the result of the default alone of the respondent, he cannot recover against the company; if

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the accident is the result of the negligence of both the plaintiff and the company, then the party who was the proximate cause of the accident is responsible, and if the appellant and the respondent were both the proximate cause of the accident, or it it is impossible to say which of them was the proximate cause of the accident, then the plaintiff cannot recover.

Now what are the facts of the case at bar. As I have already stated respondent went by the switch, although the disc signal called upon him to stop. In explanation of, or as an excuse for, his so doing, he says that the white flag signal at the "Diamond Crossing" was a notification to him that the track was clear, that, consequently, he did not pay any attention to the disc signal, and that, if there had been a man at that point with a red flag, he would have seen him, and would thereby have been warned of the danger. However, the respondent admits that he knew of the switch and of the disc signal at that point. From where he was on top of the van he claims that he could not see the disc on account of the wings of the snow-plough and also because the windows of the lookout were covered with frost. This pretention is destroyed by the evidence. Experiments were made. Witnesses went over the same part of the line as respondent, and in a similar snow-plough. They were able to see the red disc clearly, several hundred feet before arriving at the "Diamond Crossing," and until they had passed the switch, either through the windows of the look-out on the van or by leaning out of the windows. The respondent cannot shield himself behind the fact that the windows were covered with frost; it was his duty to keep them free from it. It is evident that respondent went forward blindfolded, relying exclusively upon the information that the line was clear throughout, which was his interpretation of the import of the white flag signal, and that this default on his part was the cause of the accident. Even if the white flag signal at the "Diamond Crossing" meant that the line was clear throughout, the respondent, nevertheless, was bound to run his train with care and caution, and it was his duty to respond to the red disc signal and stop his train before passing the switch. I doubt whether the presence of a man with a red flag at the switch would have sufficed to prevent the accident, such was the lack of caution or prudence on the part of respondent. So that, taking for granted the theory advanced by respondent, we are of the opinion that he was the proximate cause of the accident. The want of a

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red flag was a default on the part of the Grand Trunk Railway Company, it is true, because even if it was the duty of the Canadian Northern to station a man with a red flag at the point in question, the Grand Trunk Railway Company would be none the less liable to third parties in the event of the absence of that man; subject to their rights in warranty against the Canadian Northern Company. But this default was certainly not the proximate cause of the accident; at the most, it might be said that it contributed to it, in conjunction with the default of the respondent. In the one as in the other event, the respondent has no remedy against the appellant, according to the rules of the common law of England as already explained by me.

Under the circumstances, we think that we should nonsuit the plaintiff, and refuse a new trial. It is clear, from all the evidence, that no jury would be justified in finding any verdict other than one in favour of the Grand Trunk Railway Company.

I do not stop to examine the question whether, even after passing the switching point, when respondent perceived the Canadian Northern locomotive backing down, he could not have still avoided the collision by giving the necessary signals by the bell or the brakes which were under his control. The discussion of this aspect of the case becomes useless, since we are of the opinion that, without taking under consideration the respondent's conduct from this view-point, there is evidence of his contributory negligence, and that he has no claim against the company appellant.

A. E. Beckett, K.C., for appellant.
E. Lafleur, K.C., counsel.
Bisaillon & Brossard, for respondent.
H. J. Elliott, K.C., counsel.

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MASTER AND SERVANT.

PETTIT v. CANADIAN NORTHERN R. CO.

Manitoba King's Bench. Trial before Prendergast, J. October 23, 1912.

1. MASTER AND SERVANT (§ II E 5—252)—FELLOW-SERVANTS — WHO ARE — WATCHMAN AT LEVEL CROSSING — TRAIN CREW—COMMON LAW REMEDY.

A person employed by a railway company as a watchman at the crossing of its railway with a street railway at level is a fellow-servant with the crew of a train passing over the crossing; and, if he is killed in consequence of the negligence of the train crew, his widow cannot recover damages at common law against the railway company.

[*Waller* v. *South Eastern R. Co.*, 2 H. & C. 102; *Morgan* v. *Vale of Neath R. Co.*, L.R. 1 Q.B. 149; and *Lovell* v. *Howell*, 1 C.P.D. 161, followed.]

2. MASTER AND SERVANT (§ II A 4—109)—LIABILITY OF RAILWAY COMPANY FOR DEATH OF EMPLOYEE—BREACH OF STATUTORY DUTY—FAILURE TO RING BELL—FREIGHT TRAIN RUNNING BACKWARDS—R.S.C. 1906, CH. 37, SEC. 276.

Section 276 of the Railway Act, R.S.C. 1906, ch. 37, is for the protection of employees of the railway company as well as of the public, and the widow and administratrix of a watchman employed by the company at a level crossing of the railway with a street railway, who is killed in an accident caused by a breach of that section by the running of a freight train backwards over the crossing without any person on the end car to give proper warning of its approach, resulting in a collision with a street car crossing the tracks, may recover damages against the company under that section.

[*McMullin* v. *N.S. Steel and Coal Co.*, 7 Can. Ry. Cas. 198, 39 Can. S.C.R. 593, and *Lamond* v. *G.T.R. Co.*, 7 Can. Ry. Cas. 401, 16 O.L.R. 365, followed.]

3. DEATH (§ III—20)—WHO LIABLE FOR CAUSING—SEVERAL TORTFEASORS CONTRIBUTING TO INJURY — RIGHT OF WIDOW OF THE RAILWAY EMPLOYEE TO RECOVER.

Even if it were shewn that a street railway company, as well as a railway company, might also be liable for the consequences of an accident which resulted in the death of one of the railway's employees because of the negligence of the motorman, an employee of the street railway company, that would not prevent the recovery of full damages from the railway company.

["*The Bernina*," 13 A.C. 1, and *Burrows* v. *The March Gas and Coke Co.*, L.R. 5 Ex. 67, followed.]

THE plaintiff is the administratrix of the estate of John Pettit, her deceased husband, and brings this action for her own benefit under the Act respecting compensation to families of persons killed by accident, alleging that the death of the said John Pettit was caused by the defendant company's negligence.

Judgment was given for the plaintiff for $5,000.

W. H. Trueman, for the plaintiff.

O. H. Clarke, K.C., for the defendants.

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PRENDERGAST, J.:—That part of Main street in the city of Winnipeg, where the accident happened, runs north and south, and at its southern end, communicates with and opens on to a bridge, called the Norwood bridge, which spans the Red river.

The defendants own and operate a line of railway which intersects and crosses said Main street almost on the line of junction of the latter with the said bridge, and the track of the railway at this crossing is level with the street.

The Winnipeg Electric Railway Company own and operate a street car line which runs along said Main street and over said bridge, and the track of this line, which is also level with the street, intersects the defendants' line where the latter crosses Main street as aforesaid.

The southern end of Main street, which, as stated, abuts on to the bridge and is crossed by the defendants' line, is higher than the main portion of said street, being taken up by what was called "the incline," which begins 62 feet north of the bridge on the street level and rises gradually till it reaches the bridge at the latter's top level, thus doing service as a bridge approach.

On June 22nd, 1911, the date of the accident, John Pettit was in the employ of the defendants, as watchman appointed by them pursuant to an order made by the Board of Railway Commissioners on October 16th, 1905, under section 269 of the Railway Act, ordering

> that the said crossing (the crossing above referred to) be protected by stationing at such crossing a watchman or watchmen, . . . the said watchman or watchmen to be employed by the Canadian Northern Railway Company, who shall provide such shelter as may be necessary for him or them. . . .

This shelter had been provided for in the shape of a signal box or shanty, which is a small building about 7 feet square, standing 18 feet east from the street car track and about 8 feet north from that of the defendants.

It is shewn that the fatality happened a short time before midnight on the date stated, and that it was caused, at the intersection above described, by the colliding of a street car moving southerly, with the end car of a freight train of the defendants moving backward and easterly, whereby the street car was thrown easterly off the track, and toppled over on Pettit, who was then about 2 feet from the defendants' line, injuring him to such extent that as a consequence he died the next day.

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The plaintiff contends that the accident was due to the negligence of the crew operating the freight train, and claims both at common law and under the Railway Act.

I will dispose at once of the claim at law, which does not require any further inquiry of fact than is above set out.

I do not think the plaintiff can succeed on this branch of his case, for the reason that he and the train crew were discharging duties under common employment at the time of the accident. The distinction urged that the duties of the crew in operating the train were different from those of Pettit, who was watching at the crossing, does not seem sufficient to negative the character of common employment. They were all employed in a general way in connection with the service of the running of trains, and, moreover, besides the application and use of the propelling power, it was also the crew's duty to give from the train all reasonable and proper signals or warnings to the public, the very duty which Pettit had also to perform on the level of the crossing.

In *Missouri, K. & T. R. Co.* v. *Goss*, 72 S.W.R. 94, the action seems to have been under the statute only and so cannot support the distinction advanced. To what extent the Courts have gone in refusing to accept such distinctions as fundamental was shewn in *Waller* v. *South Eastern R.*, 2 H. & C. 102; *Morgan* v. *Vale of Neath R. Co.*, L.R. 1 Q.B. 149, and *Lovell* v. *Howell*, 1 C.P.D. 161.

Dawburn, in his work on Employers' Liability, 4th ed., p. 5, after stating that there are two essential ingredients in common employment—a common work and a common master—adds significantly:—

> What constitutes a common work and common master often involves points of the greatest nicety. As regards common work, I cannot find a case of different occupation which has been held to constitute a good answer to the defence of common employment.

This seems to me to be fatal to this branch of the plaintiff's case.

I should say, however, that, were the plaintiff not precluded, in my opinion, for the reasons stated, from setting up a common law liability, I should find in his favour on the facts, as will appear hereafter.

I now come to the case under the statute.

It was urged for the defence that the sections of the Railway Act on which the plaintiff relies are meant for the protection of

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the public and not of employees. In *McMullin* v. *N.S. Steel & Coal Co.*, 39 Can. S.C.R. 593, it was held that section 251 of the Railway Act of Nova Scotia, which is similar to section 276 of the Dominion Act, is for the protection of servants of the company standing on or crossing the tracks as well as of other persons. And in *Lamond* v. *G.T.R. Co.*, 16 O.L.R. 365, which is directly in point, as the person injured was a watchman as in this case, the Court held that

> although the deceased was an employee of the defendants and it was his duty to protect persons crossing the tracks from the cars, he had a right to rely, as far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section (section 276 of the Railway Act) being complied with.

The plaintiff may then avail herself of the statute.

Now, what are the facts? The evidence shews that the night in question was a very dark night. There was, however, an electric light near the foot of the incline, and another near the crossing. The distance from the crossing at which a car without lights on the defendants' tracks could be seen was variously estimated at from 40 to 200 feet.

It was Pettit's custom, as his duty required, to be on the look-out and whenever a train or street car was in sight, to keep himself in the vicinity of the crossing, generally opposite the signal box, and perhaps more frequently somewhat to the south thereof. To a street car he would signal a clear road by producing a white light at night or a white flag in the day time, or give the stop order by producing a red light or red flag, also according to the time of day. C.N.R. trains having the right of way, there was apparently no occasion to give them the pass signal; but one of the train crew stated that it was his custom when coming near the bridge to whistle to the flagman, who would then come out with a red lantern and give him the pass order by waving it in a circle.

There were eleven witnesses for the plaintiff, all apparently reputable and most of them of the best standing in the community where they live, who seem to have been in a position to judge and know, and whose evidence is to the effect that when the train was approaching the bridge they neither saw the train itself or any man or light on it, nor did they hear any bell, whistle or other warning of any kind.

Walter Leslie, Miss Leslie and Miss Agnes Kasler were going over from Winnipeg to Norwood; they were familiar, with the

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crossing, and knew that there might be danger there at all times. Mr. Leslie says that he would always be on the alert at the crossing. That night when crossing the C.N.R. tracks, they neither saw any light nor heard any sound revealing an approaching train, although Mr. Leslie said that he always looks both ways before crossing and Miss Leslie says she actually looked in the very direction of the train; and they had proceeded further only one minute, having covered less than 100 feet in the meantime, when the crash told them of the catastrophe.

Then, there are the conductor of the street car, and Mr. and Mrs. Treleaven and Miss Averal, who were passengers thereon. The conductor saw the train only when within 12 feet from it. Mr. and Mrs. Treleaven were so seated as to have a clear view of the track westward. The first says that he was naturally looking in front, and the latter says, "I was looking towards the track for there was my life and I felt sure the track was clear," and the car was struck before they had realized that anything was coming. Miss Averal just caught sight of a box car coming in the dark when it was 8 or 10 feet away, and would call an untruth any assertion that there was a light on that car.

There was also on the incline quite close to the street railway and about 37 feet from the C.N.R. track, a party of four waiting for a car to proceed to Norwood. The first car to come, which was the one in question, however, passed without stopping as they expected, which naturally caused them to follow it by sight as it went by. The collision occurred almost at once. These witnesses are John Gibson, William Knutson, Miss Kate McKenzie and Miss May Ross. The first is positive and the three others are moreover vehement in their declaration that they were in a position to hear and see, that they heard no sound of bell or whistle and that there was neither man nor light on the end box car.

On the evidence of those eleven witnesses I come to the conclusion that there was no warning given. If the bell was rung at all as stated by one witness for the defence, it was not rung when near the bridge, or the sound of it at all events did not constitute a warning whatever may have been the cause, as it was not observed by intelligent people careful for their lives, who were apprehensive of danger and were listening for just such warning. The same may be said about a light on the last car. I may say that the testimony of Dowdle and Wilkinson does not commend itself to me at all; but it is sufficient that the evi-

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dence should shew, that, if there was such a light there, it was of such a nature or in such condition or held or placed in such position that it could not be seen by people watching for such signal, and that it was consequently useless as a warning.

The evidence also shews that Pettit was there in the proper place at the proper time, active and vigilant in the discharge of his duties as a watchman. It is established that, after looking in all directions, and in circumstances which shew his unapprehensiveness of danger, he deliberately gave the white lamp proceed signal to the car which was at the foot of the incline; and that almost at once after the car had started he (Pettit), shewing signs of distress, moved about, quickly moving his lamp in a manner which was not understood at the time, but which subsequent events shewed he meant as a danger signal and reverse order.

It seems to me that there is no other conclusion to reach but that it was at the same moment, although he had just been looking westerly as well as in other directions, that he first caught sight of the train backing up on to the crossing.

Dowdle, who claims he was on the end car with a lamp, says that, as he was approaching the bridge, he whistled out with his fingers to Pettit, and that the latter came forward with a red lantern and gave him the proceed signal by waving the same in a circle. I absolutely disbelieve this. This man's manner of giving evidence, and his general behaviour were not at all satisfactory to me. But the main consideration is that his contention is altogether inadmissible in the light of that part of the evidence with respect to Pettit's signalling the street car, which was so firmly and abundantly established—unless it be held that Pettit was suddenly stricken with insanity or seized with a murderous impulse, which there is surely no ground for assuming.

There were eleven witnesses who, at different places, but most of them simultaneously and throughout, followed Pettit's course of action, and their evidence covers the full range of possible events in such a way as to leave no room for admitting such signalling as Dowdle says was given to him. The nearest approach to corroboration of Dowdle's testimony was by Miss Kasler, who says that when she passed the crossing with Mr. and Miss Leslie, Pettit was there, having in his left hand a red lamp and a white lamp.

What appears to have happened is this: Pettit, having looked from the west side of the bridge in the direction of the C.N.R.

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track as Miss Kasler said he did, and found everything in order on that side, as he thought, proceeded towards the shanty, where he probably put on the ground the red light. He then gave to the street car the white pass signal. Then, becoming suddenly aware of the approach of the train, he tried by waving the white light right and left to reverse his pass order to the car. What followed exactly must be greatly a matter of surmise. He probably conceived at that moment the idea of signalling to the train as well. It was probably with that end in view that he rushed towards the signal house as he was seen to do. There he probably grasped the red light and had perhaps begun to wave it, possibly in an agitated and disordered manner, when the collision took place and the car was pushed over and fell on him, smashing at the same time the red lamp, which was later found at that spot. There is no reason to believe that Dowdle, wherever he may have been then, could have seen any waving of the red light by Pettit, except at the moment, at the place and in the manner just stated.

With respect to the defendants' contention that, inasmuch as the street car only slowed up and did not exactly stop at the foot of the incline as it should have done under the Railway Commissioners' order, the street railway company were the cause or one of the causes of the accident, I would say that, even if they were a factor in the event, the case would come within the decision in *"The Bernina,"* 13 A.C. 1, and *Burrows* v. *The March Gas & Coke Co.*, L.R. 5 Ex. 67.

In my opinion the plaintiff is entitled to recover under the statute, and I assess the damages at $5,000.

There will be judgment for the plaintiff for the amount stated with costs.

Judgment for plaintiff.

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NEGLIGENCE.

SMITH v. GRAND TRUNK R. CO.

(Decision No. 2.)

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. September 27, 1912.

1. MASTER AND SERVANT (§ III A 4—89)—RAILWAY SWING BRIDGE—NEGLIGENCE.

Where a locomotive driver ignored and passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead, and the conductor signalled him to go ahead, and he, still ignoring the semaphore, ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to his own negligence.

[*Smith* v. *Grand Trunk R. Co.*, 2 D.L.R. 251, reversed; *Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 379, restored.]

2. MASTER AND SERVANT (§ III A 4—89)—SWING BRIDGE ON RAILWAY—SEMAPHORE AND BRIDGE LIGHTS.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, is applicable where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned, although the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights on the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so.

[*Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 379, restored; *Smith* v. *Grand Trunk R. Co.*, 2 D.L.R. 251, reversed.]

APPEAL by the defendants from the order of a Divisional Court, *Smith* v. *Grand Trunk R. Co.*, 2 D.L.R. 251, 3 O.W.N. 659, reversing the judgment of Britton, J., 3 O.W.N. 379, and directing judgment to be entered for the plaintiff upon the findings of the jury at the trial.

The appeal was allowed and judgment of Britton, J., restored.

I. F. Hellmuth, K.C., and *W. E. Foster*, for the defendants.

J. R. Logan, for the plaintiff.

GARROW, J.A.:—The action was brought by the plaintiff, the widow and administratrix of Charles Franklin Smith, to recover damages caused by his death, under circumstances of

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alleged negligence, while in the employment of the defendants, as a locomotive engineer. The accident in which the deceased met his death occurred about 10.30 p.m. on the 20th July, 1911, at Port Colborne, where the engine on which he was employed was by some one's fault thrown into the Welland Canal through an open drawbridge, and he was killed.

A special, consisting of 35 freight cars, a caboose, and the engine and tender in charge of the deceased, left Fort Erie about 9.45 p.m., proceeding westerly. When it arrived near the drawbridge, the signals were set against the train. The engineer blew the necessary blasts with the whistle, but did not get a signal to advance. He then said to his fireman—the semaphore remaining set against him—"We will fill the tank up;" and proceeded for that purpose to the stand-pipe, which is situated between the semaphore and the bridge, thus passing the semaphore, which was still set against him. His duty, according to the printed instructions put in, was to detach the engine from the train when of over fifteen cars, as this was, when about to take water. This he did not do, but, instead, advanced with the whole train until the engine was at the stand-pipe, about 70 feet in advance of the semaphore. While engaged in taking water, and apparently without again looking at the semaphore, he signalled to the conductor—who was some 1,200 feet way, at the rear of the train—"I am ready to proceed;" to which the conductor replied, "All right." The train at once proceeded, and in less than five minutes the catastrophe had occurred.

The signals from the engine were given by whistling; those from the conductor by means of the lit-lantern which he carried.

The drawbridge was properly open for the purpose of passing a boat upon the canal.

The rules of the defendants were put in, and Nos. 22, 52, 59, 60, 213, 232, and 233 were specially referred to at the trial and before us.

Rule 22, under the heading "Conductors, Baggageman and Brakemen," says: "The train is entirely under the control of the conductor, and his orders must be obeyed except where they are in violation or conflict with the rules and regulations, or plainly involve any risk or hazard to life or property, in each of which cases all participating will be held alike accountable."

Under the heading "Engine Men," rule 62 says: " . . . they must obey the orders of the conductor of the train in regard to starting, stopping, and switching cars, speed, and

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general management of the train, unless they endanger the safety of the train or require violation of the rules." Rule 59: "They must obey all signals given, even if they think such signals unnecessary. When in doubt as to the meaning of a signal, they must stop and ascertain the cause; and, if a wrong signal is shewn, they must report the fact to the conductor." Rule 60: "They must always keep a sharp look-out ahead, noting carefully the position of switches, semaphores, and other signals . . ."

Under the heading "Movement of Trains," rule 43 says: "All trains must approach stations, the end of double track, junctions, railroad crossings, at grade, and drawbridge prepared to stop, and must not proceed until the switches or signals are seen to be right, or the track is plainly seen to be clear."

Rule 232 says: "Conductors and engine men will be held equally responsible for the violation of any of the rules governing the safety of their train, and they must take every precaution for the protection of their trains, even if not provided for by the rules."

And rule 233 says: "In all cases of doubt or uncertainty take the safe course and run no risk."

The printed "special instruction" as to detaching the engine before taking water reads as follows: "Freight trains of more than fifteen cars in taking water must stop before reaching the water-tank or stand-pipe, and the engine must be cut off before water is taken. The brakes must not be released on train until the engine is again coupled on and ready to proceed."

At the trial, as appears from the charge of the learned Judge, the plaintiff's case was rested entirely upon two acts of negligence, viz., the act of the conductor in giving the signal to go ahead and the acts of the bridge-tenders after they saw that the train had passed the semaphore and was proceeding towards the bridge.

The learned Judge reserved the defendants' motion of nonsuit, and submitted certain questions to the jury, which, with the answers, are as follows:—

1. Was the conductor, McNamara, who was in charge of the train on the engine of which the deceased C. F. Smith was engineer, guilty of any negligence by reason of which the engineer, C. F. Smith, lost his life? A. Yes.

2. What was that negligence? and answer that question fully. A. Having passed the semaphore, if the conductor had full

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authority in the running of the train, he, McNamara, should have signalled the engineer to back up the train again until the semaphore was lowered.

3. Was the deceased, the engineer, guilty of contributory negligence: that is, could the engineer, by the exercise of reasonable care, have avoided the accident? A. Yes.

4. In what respect was the engineer, Smith, so guilty? A. By passing the semaphore without permission.

5. Apart from what may be said of negligence on the part of the conductor or the engineer, was there any negligence on the part of the defendants which occasioned the death of the engineer? (Referring to the bridge tender.) A. No.

6. If so, what negligence do you find these bridge tenders were guilty of? A. Nothing.

The jury upon the question of damages said they were of the opinion that the amount of such damages would be $3,600, but they would only allow one-half of that sum, or $1,800.

Britton, J., afterwards delivered judgment dismissing the action without costs. The view taken by the learned Judge is expressed in the following extract from his judgment: "It is argued that the death of the engineer was caused by the negligence of the person in charge of the train within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act. The defendants' rule 22 puts the train entirely under the control of the conductor, and his orders must be obeyed except where they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable. Rules 52, 60, 213, and 232 were also cited. In view of these, and inasmuch as the deceased knew that the semaphore was up, and not lowered for the train of the deceased, he must be held equally responsible with the conductor; and so I must dismiss this action."

As appears in the learned Judge's charge, he had presented to the jury for their consideration the contention of the plaintiff that the result was brought about solely by the negligent signal to advance given by the conductor, and that any negligence of the engineer in passing the semaphore had then ceased to be operative, and the opposing contention of the defendants, which is thus described by the learned Judge: "It is said in argument, in reference to him, that his signal only meant, and it would only be understood by the engineer, that it was all

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right at his end of the train. 'You are on your engine drawing this train. It is for you to see that it is all right for you.' Using the wording of rule 213, 'it has to be plainly seen by you that the track is clear to go upon the bridge and to cross over the bridge, and assuming it is your duty and that that is all right, then it is all right for you to go ahead.' That is the meaning, it is said, so far as this conductor is concerned, in answering from the rear end of the train the signal that was given to him by the engineer. Now, it is for you to say whether this conductor, in your opinion, was guilty of the negligence which caused the engineer, under those circumstances, to go forward with his train."

The Divisional Court adopted the plaintiff's contention and allowed the appeal.

I am, with deference, of the opinion that the view taken by the learned trial Judge was correct. He might very well, in my opinion, even have granted the motion for nonsuit made by the defendants at the close of the plaintiff's case—all the undisputed facts upon which his final judgment was based having then appeared.

But, assuming that the case was one proper to be passed upon by a jury, I am quite unable to agree with the Divisional Court that it was permissible to ignore the finding of the jury as to the engineer's contributory negligence. There is no evidence that they did not fully understand and appreciate the exact situation. The charge had fully instructed them as to the opposing contentions of the parties. Under that of the plaintiff, there was no contributory negligence causing or helping to cause the accident. Under that of the defendants, the engineer's original negligence in passing and ignoring the semaphore continued, while the action of the conductor was a mere incident in bringing about the result.

It is, I think, impossible to regard the findings as a whole as having in any way attributed the advance to the signal of the conductor. On the contrary, the jury's idea of the conductor's negligence is not that he gave that signal, but that he should have given an order to the engineer to back up until the semaphore was lowered. And that the jury were convinced that the engineer was in fault is decisively evidenced by their very unusual method of dealing with the damages.

I would, for these reasons, allow the appeal and affirm the judgment of the trial Judge. And the defendants should have,

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if they ask, the costs of the appeal to the Divisional Court and to this Court.

MEREDITH, J.A., concurred in result.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Appeal allowed.

MONTREAL STREET R. CO. v. CONANT.

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. October 31, 1912.

1. TRIAL (§ III E 4—253)—CORRECTNESS OF INSTRUCTION—NEGLIGENCE OF STREET RAILWAY—MODIFICATION OF INSTRUCTIONS — DESISTING AGAINST ONE OF DEFENDANTS.

Where, in a jury trial of an action for negligence against a street railway company and a municipal corporation, the plaintiff desists from his action as against one of two defendants jointly sued in damages and the trial Judge thereupon modifies the assignment of facts to be submitted to the jury, no prejudice is suffered by the remaining defendant if the assignment of facts as modified allows the jury to find the accident was due either to the negligence of the plaintiff, or to that of the defendant or to that of neither of them.

2. STREET RAILWAYS (§ III B—28)—OPERATION—RATE OF SPEED—MUNICIPAL BY-LAW—DUTY TO USE CARE EVEN WHEN RUNNING WITHIN PRESCRIBED LIMIT OF SPEED.

Where a municipal by-law fixes a limit of speed, *e.g.*, eight miles an hour for the street cars of a company, such company is not thereby authorized to run its cars at such maximum speed regardless of conditions and circumstances; hence a speed of not more than five or six miles an hour may be imprudence on a dark, rainy night on slippery rails and on a dimly lighted street, and if such car causes injury to a person crossing at the intersection of streets the company will be liable in damages.

THIS was an appeal by the defendant company from the judgment of the Superior Court, Demers, J., assisted by a jury, rendered at Montreal, on March 8, 1912, condemning it to pay to the plaintiff the sum of $3,000 damages.

T. Rinfret, K.C., for the appellant.

P. Beullac, K.C., and *H. J. Elliott,* K.C., for the respondent.

October 31, 1912, Montreal. ARCHAMBEAULT, C.J. (translated):—This is an action in damages where judgment was rendered according to the verdict of the jury. The respondent's

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wife, Lydia Charland, was struck by one of the company's cars on May 21st, 1910, about ten o'clock at night, as she was crossing Papineau avenue, from Lalonde avenue. The left limb had to be amputated above the knee. The respondent and his wife are common as to property and the husband is the plaintiff in the present case. He claims $10,400 from the appellant. The jury rendered their verdict and found the accident was due to the common fault of the company and of the victim, and awarded the plaintiff $3,000. Judgment was rendered according to the verdict.

The appellant complains of this judgment and prays for its reversal on three grounds:—

1. Because the trial Judge during the suit, modified the assignment of facts and thereby injustice was done to the appellant;

2. The verdict is not based on the plaintiff's declaration but on a fault not therein alleged;

3. The verdict is contrary to the weight of the evidence, such that no jury could reasonably find otherwise than in favour of the appellant.

As to the first point. The action was at first directed against the appellant and against the city of Montreal. The declaration alleges that the accident was caused through the fault and negligence of the appellant and of the city of Montreal; that of the city being the fact that the street was insufficiently lighted, and was full of stones, obstructing it; that of the appellant being the failure to have a proper headlight on the car, the excessive speed of the car, the insufficiency of the brakes and the inexperience and incompetency of the employees of the company. The assignment of facts was drawn according to this declaration. The minutes of the trial shew that after the enquete had been declared closed by both parties, the plaintiff declared that he desisted from his demand as regards the city of Montreal. The Judge then ordered that the assignment of facts be modified accordingly, and he struck out all questions tending to have the city of Montreal declared responsible either for its sole fault or for its fault and that of the appellant.

The appellant contends that this modification in the questions submitted to the jury caused it prejudice in that the jury were no longer called upon to answer whether the accident had been caused by the exclusive fault of the city of Montreal, an answer which might have relieved the company of all responsibility. The jury, says the appellant, then found themselves face

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to face with an assignment of facts which necessarily presupposed that the accident had been caused either by the fault of the victim or by that of the company, without being given an opportunity to pass on the fault of the city of Montreal or of a third person.

I am of opinion that this first ground of the appellant is ill-founded. - The assignment, as modified by the trial Judge, allowed the jury to weigh the case as a whole and to declare whether the accident was due to the sole fault of the appellant, to the sole fault of the victim, to the common fault of these two parties, or without the fault of either of them . . . Had the jury been of the opinion that the accident was due to insufficient lighting, or to the presence of obstructing stones in the street, or to any other fault not imputable to the appellant it would have answered negatively to the three questions. The changes brought by the trial Judge, therefore, caused no prejudice to the appellant.

The second reason urged by the appellant is to the effect that the verdict is not based on the declaration. Paragraph 4 of the plaintiff's declaration which charges fault against the appellant reads as follows:—

> The negligence of the defendant, the Montreal Street Railway Company, consisted in the absence of proper and sufficient light, in front of the car, as required by the by-laws of the city of Montreal, and by the said defendant's own regulations and usage, also in the fact that the car was driving too fast, viz., faster than provided by the by-laws of the city of Montreal; that said car was provided with an improper, insufficient and dangerous fender or guard, and that said car was equipped with improper and insufficient brakes and appliances, which had long been condemned by the officers of the said defendant, and furthermore, said car was in charge of inexperienced and incompetent employees.

As already stated, the jury found that the accident was due to the common fault of the victim and of the appellant and this is how it defined the fault of each. I quote textually:—

> Madame Charland aurait dû exercer plus de prudence, attendu qu'elle est sourde, et attendre avant de s'engager sur la traverse; quant à la compagnie, son employé aurait dû aller plus tranquillement ou arrêter, sachant qu'il faisait si noir qu'il ne pouvait voir.

The appellant contends that in order to conform to the declaration the verdict should have found that the speed of the car was greater than that allowed by the by-laws of the city of

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Montreal, and that by simply declaring that the defendant's employee should have gone more slowly or should have stopped on account of darkness, the jury based their verdict on a fault not alleged against the appellant. In returning this verdict, says appellant, the jury went outside of the question as raised by the parties and placed the controversy on totally new ground.

There is no doubt of course that a plaintiff can only succeed at law "*secundum allegata et probata.*" But I do not think that, in the present case, it can be said that the verdict is contrary to this legal maxim. The declaration alleges that the street where the accident occurred was not sufficiently lighted, that the light in front of the car was insufficient, and that the car was driven faster than allowed by the city by-laws. The jury returned that the company was at fault in that its employee should have driven more slowly or should have stopped knowing that it was so dark he could not see.

This verdict seems to me perfectly based on the allegations of the declaration. The appellant claims that the by-laws of the city of Montreal authorize the company to drive its cars at a speed of eight miles per hour, that the car in question was only going at five or six miles per hour, and that, consequently, the verdict is not founded on the declaration which charges that the car's speed was greater than that allowed by the by-law. By-law No. 210, on the point at issue, indicates and fixes the extreme of speed allowed for cars. They must not go faster than eight miles an hour. But if that be the maximum speed allowed under the most favourable circumstances possible—in broad daylight, fine weather, between crossings—should it not be inferred that, if the conditions are unfavourable, then the same speed is no longer allowable; and if this speed is kept up, notwithstanding, can it not be said that the car is being driven at a greater speed than that allowed by the by-law? It seems to me that the jury could perfectly well interpret the by-law in this sense, and render a verdict accordingly.

In the present case the motorman should certainly have been more prudent. It was 10 o'clock in the evening; it was a very dark night; the street was scarcely lighted; it had rained and the rails were more slippery than usual; several witnesses swear positively the car had no head light. All these circumstances obliged the motorman to drive his car at a very moderate speed and even to stop, as the jury said, before crossing streets. Now the motorman himself admits he was running his car at a speed

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of five or six miles per hour. If a speed of eight miles an hour is the maximum speed allowed by the by-laws, then surely speed of five or six miles under the conditions just mentioned is not in accord with the spirit of the by-law. For these reasons I cannot admit that the verdict is not founded on the allegations of the declaration.

In the third place the appellant contends that the verdict is contrary to the weight of the evidence. From the foregoing remarks it is evident that I do not agree with the company's pretensions. I find the verdict well founded, and the judgment is affirmed purely and simply.

Appeal dismissed.

DAYNES v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 5, 1912.

1. STREET RAILWAYS (§ III B—27*a*)—REAR END COLLISION—FAILURE BY MOTORMAN TO OBSERVE RULES.

Where it appears from plaintiff's own evidence that he was familiar with a rule of the railway company calling for a five minute interval between cars and he, as motorman of a car, failed to observe that rule, which failure on his part caused a collision with a car ahead, a verdict by the jury in his favour will be set aside and the action dismissed on appeal. (*Per* Macdonald, C.J.A., and Galliher, J.A.)

2. WITNESSES (§ II A—32)—REFRESHING RECOLLECTION—REFERENCE TO NOTES MADE AT TIME OF TRANSACTION.

A witness may refresh his recollection from notes made by him at the time of a transaction in question and then make a statement as to the truth of that memorandum. The rule is that the memorandum proposed to be looked at must be made by the witness, or adopted as a correct account by him at or about the time when it was made. (*Per* Irving, J.A.)

3. WITNESSES (§ II A—32)—REFRESHING RECOLLECTION—NOTES MADE AT TIME OF TRANSACTION—LOSS OF ORIGINAL—ACCURACY OF COPY.

Where the loss of original notes of a certain transaction in question has been proved, and that a transcript thereof has been made on the following day, and that this copy was accurate, and the memory of the witness has been exhausted on the subject, he has a right to refresh his memory by reference to the copy. (*Per* Martin, J.A.)

APPEAL by defendants from the judgment of Hunter, C.J. B.C., for damages resulting from collision.

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The appeal was allowed and the action dismissed.

L. G. McPhillips, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

MACDONALD, C.J.A.:—The pliantiff admits that he was familiar with Rule 91 of the Standard Rules, which, insofar as need be recited here, reads:—

> Unless some form of block signals is used, trains in the same direction must keep at least five minutes apart, except in closing up at stations. When the view is obscured by curves, fog, storms, or other causes, they must be kept under such control that they may be stopped within the range of vision.

I do not intend to enter into a discussion as to whether or not the system of despatching and operating cars on this inter-urban tramway was a defective one. Under any practical system something must be left to the intelligence and care of those in charge of the trains or cars. If the above rule requiring the rear car to keep five minutes behind the leading one was not observed by defendants' motormen to the knowledge of the defendants, as the plaintiff swears, and if, as he also swears, the customary rule was to keep a distance of about 700 feet behind, he was bound, and the duty was more insistent, because of the near proximity of the car ahead, and the fog, to observe scrupulously the latter part of the rule.

The facts upon which my decision depends are not in dispute. The plaintiff was following the car "Cloverdale," approaching Strathcona station in a dense fog. He knew by certain land marks that he was approaching the station, the horseshoe curve and arc light enabling him to tell exactly where he was. He admits he knew that the Cloverdale would probably stop at that station to let off passengers: he intended to stop his own car there also. The Cloverdale was standing at the station when the plaintiff arrived, with its rear at the far end of the platform, yet the plaintiff came to the station at such speed that he was unable to stop his car though all brakes were in order, before the front of it had reached the far end of the platform and crashed into the rear of the Cloverdale with such force as to telescope the vestibule of his own car and to do considerable damage to the Cloverdale. I think the plaintiff is responsible for what happened, and that the jury could not reasonably, upon the facts in evidence, assuming a negligent system, acquit him of contributory negligence.

I would, therefore, allow the appeal and dismiss the action.

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IRVING, J.A.:—The defendants, in my opinion, are at least entitled to a new trial on the ground of non-reception of evidence. The mistake into which the learned Judge fell, I think, was in forgetting the purpose to which the extended notes was to be applied. The practice of refreshing one's memory is an every-day affair, whether for the purpose of giving evidence in Court or merely for the recalling of one's engagements. One looks at the note of the incident and then is able to act or speak with certainty. The note is not the evidence. The testimony of the witness is that having refreshed his memory by looking at the note, he is now able to make a statement.

In *Burton* v. *Plummer* (1834), 2 A. & E. 341, a clerk to a tradesman entered transactions as they occurred into a waste book from his own knowledge. These entries were afterwards copied into a ledger by the master and the clerk checked them off. It was held that the clerk could look at these ledger entries for the purpose of having the facts brought to his mind. In this case the waste book has been destroyed. Erle's argument, which prevailed, was to the effect that the ledger entries were in the nature of an original memorandum made by himself though not with his own hand.

The extended notes, in my opinion, may be regarded as duplicates or quasi-originals of the memorandum taken the day before. The rule is that the memo. proposed to be looked at must have been made by the witness, or adopted as a correct account by him, at or about the time when it was made.

On the merits of the case I think the verdict for the plaintiff cannot stand. He was the author of his own misfortune. The Rules plainly call for a five-minute interval between cars. Mr. Taylor seeks to invoke the rule of statutory construction that the headings govern the rules which are ranged immediately under it. It may well be that headings are inserted for convenience of reference and are not intended to control the interpretation of the clauses which follow: see 9 App. Cas. 369. It does not appear to me that Rule 91 applies to trams run by time tables only. In my opinion, Rules 83, 94, and 91 can very well be read together.

I would set aside the verdict and dismiss the action.

MARTIN, J.A.:—It is, from the view I take of the case, necessary to first consider the application for a new trial based upon the alleged improper rejection of the evidence of McCutcheon.

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Assuming that evidence to be material, I have no doubt, after examining all the authorities cited to us, and also *The King* v. *Inhabitants of St. Martins,* 1 C. & K. 210, and 13 Hals. 595-6, on "Evidence," that it should have been admitted; the loss of the original notes was proved, also the transcript thereof on the following day, and the accuracy thereof, and the memory of the witness had been exhausted on the subject (pp. 115-6): the right to refresh his memory by reference to the "exact copy" had, in my opinion, been established.

It cannot, I think, be successfully contended that the evidence was immaterial. The question asked (p. 114) as to the statement made by the plaintiff respecting the position of the car "Cloverdale" indicates, to my mind, the general object of the evidence which would, for one thing, be adduced to support the contention that the plaintiff was guilty of contributory negligence; or by shewing that he had made conflicting statements, to discredit him in the minds of the jury. What happened was, in the circumstances, really tantamount to the total rejection of the witness before counsel for the defendant had reached a stage where he could be called upon to do more, and in such circumstances his remark that, "I don't think I can ask the witness anything more that would be useful," was quite understandable and appropriate.

There must, I think, be a new trial; the costs of the former one to abide the result of the second; the appellant should have the costs of the appeal.

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KING LUMBER CO. v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A.
November 5, 1912.

1. PROXIMATE CAUSE (§ II A—17)—SPREAD OF FIRE—SEVERAL CONCURRENT FIRES AS CAUSE.

Where it appears that the loss by fire was occasioned by the concurrence of several fires for only one of which the defendant was liable, a refusal to put to the jury the question of what other fires were burning at the time in that vicinity and which one or more of such fires occasioned or contributed to the burning of the plaintiff's property, will not justify a new trial, where the judge in his instructions to the jury fully covers that point.

2. TRIAL (§ I D—15)—CROSS-EXAMINATION OF WITNESS BY REFERENCE TO DEPOSITION TAKEN ON DISCOVERY—FALSE IMPRESSIONS DRAWN THEREFROM—DISCRETION OF TRIAL JUDGE.

Where a witness is cross-examined by reference to his deposition taken on discovery, it is not permissible to conduct the proceedings in such a way as to give to the jury a false impression of the evidence given by the witness on discovery, and where that is attempted, the trial judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression. (*Per* Irving, J.A.)

AN appeal by defendants from the judgment of Clement, J., in an action for damages caused by the spread of fire.

The appeal was dismissed, MARTIN, J.A., dissenting.

Davis, K.C., and *McMullen*, for appellant.
S. S. Taylor, K.C., for respondent.

IRVING, J.A.:—I would dismiss this appeal.

There was, in my opinion, evidence sufficient to justify the jury in coming to the conclusion that the fire which caused damage to the plaintiffs was either wholly or in part the combined fire which, according to the evidence of the bridge gang, Sam. McDonald, and the two deWolfes, travelled from the northwest corner of lot 45026, or the hillside fire, which broke out to the east of the pump-house on the 29th or 30th June, and I agree that the questions submitted by the defendants' counsel might very properly have been left to the jury; but having regard to the whole charge of the learned Judge, I am of opinion that the case was properly left to the jury, and that we would not be justified in disturbing the verdict.

A question was raised during the argument as to the practice of cross-examining a witness from the deposition taken on discovery. I think that it is not permissible to conduct the

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proceedings so as to give to the jury a false impression of the evidence given by a witness on discovery. Where that is attempted the trial Judge in his discretion may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression.

MARTIN, J.A. (dissenting):—After a re-consideration of the charge and the evidence relative thereto I can find no escape from the conclusion that there must be a new trial for misdirection.

The objection clearly raised by counsel (on pp. 648-9 of the appeal book) involved an important question which should have been placed before the jury because, quite apart from the point raised as to the "Curzon" fire, there was unquestionably evidence to go to them with respect to the fire on the hillside which was admittedly burning for some hours before it was enveloped in the big fire, nevertheless the question as to how far that fire contributed to the damage, if at all, was definitely withheld from the jury. It may possibly be that the jury might have taken the view that it (the "hillside" fire) was caused by sparks from the big fire and therefore must be deemed to be part of it, but that is a matter they have never passed upon, though to us essential to determine it before damages can be properly assessed and the responsibility therefor placed upon the proper shoulders. The direction to the jury on pp. 654-5, that the question was one of a "preponderating fire," is, with all respect, one that cannot be supported and must inevitably have led the jury to a wrong conclusion. It is not a question of preponderance of size but distribution of liability, and if there were three or more fires contributing to the damage, the "preponderating" one is no more the "real cause" of the damage than the lesser ones. Each is the "real cause" of the damage it creates and the principle is not altered by any difficulty in its application. If my land is damaged by the discharge upon it of combined streams of refuse from two different factories, each of the factories is liable for the damage caused by its own stream though one of them may greatly "preponderate" in volume over the other; and though the cause of the damage to me may be "concurrent" because the two streams have intermingled before discharging upon my land in one flow, yet that does not relieve the authors of the original two streams from their several responsibility for such share of the damage as may be apportioned between them according to the quantum of the refuse discharged.

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It may be, in the case at bar, that even if the "hillside" fire were found to be an independent one, the damage occasioned thereby would be very small, but that does not alter the principle; indeed, it would only increase my regret that a matter which might so easily have been placed before the jury and disposed of was not so dealt with, thereby avoiding the heavy expense of this appeal and of the lengthy new trial which must be, in my opinion, ordered. The costs of the former one should abide the result of the new, and the respondent will have the costs of this appeal.

GALLIHER, J.A.:—The question of liability only has been tried. On the evidence, I do not think we would be justified in interfering with the finding of the jury.

There remains only the question as to whether there should be a new trial by reason of the fact that the learned trial Judge refused to put certain questions to the jury and also by reason of misdirection.

A series of questions were put to the jury and Mr. Davis, counsel for the defendants, requested that the following questions also be submitted:—

> What, if any, other fires than that fought on July 10th, were burning in the vicinity of Yahk or Curzon, on or prior to July 30th, 1910?
>
> What one or more of such fires occasioned or contributed to the burning of the plaintiff's property?

This the trial Judge refused to do, and instead charged the jury as follows:—

> Now, just a word with reference to the point raised by Mr. Davis. In these cases you have to arrive at what has been called the real cause of the loss. If you find that there was a junction of any of these fires and the evidence does not satisfy you that one or the other was the preponderating fire, so to speak, then you have to answer the first question, either "it began down the valley," "it began at Yahk," or "we do not know where it began," that is, the fire that did the damage, the real cause, the real cause of the catastrophe. For instance, supposing the fire that began on Yahk townsite or near Yahk townsite smouldered there and got in this draw in the hills, if that fire would have died out had it not been for the other overwhelming fire coming from lower down the valley, then you would say that the real cause of the plaintiff's loss was the fire that came from down the valley.
>
> If there was a concurrent cause and you are not able to say which was the preponderating cause, you simply have to say, "we cannot

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definitely determine what was the origin of the fire that did the damage." It is a difficult point, I quite see. If there were two fires which came together, one of which they are responsible for and the other they are not responsible for, and you are unable to say which was the preponderating fire which caused this loss, then you will simply say you cannot say, and if you cannot say the defendants, of course, win, because the burden is on the plaintiff to lead you to such a state of conviction that you find ultimately in their favour.

This charge really deals with the questions which Mr. Davis asked to be submitted so that unless there is misdirection in the manner in which the jury were so charged the defendants are not entitled to a new trial.

Reading the whole of that part of the charge complained of I do not think it is unfavourable to the defendants—portions of it, if they stood alone, might be so construed, but we should read it altogether and so read, in my opinion (and after a perusal of the authorities cited), it does not amount to misdirection.

I would dismiss the appeal.

Appeal dismissed, MARTIN, J.A., *dissenting.*

McDOUGALL v. GRAND TRUNK R. CO.

Ontario Court of Appeal, Garrow, Maclaren, Meredith and Magee, JJ.A. November 19, 1912.

1. RAILWAYS (§ II D 1—32)—NEGLIGENCE—DUTY TO OPEN VESTIBULE DOORS AT STATIONS.

It is the duty of a railway company operating a vestibuled passenger train to open the vestibule door of the day coach at which passengers may expect to alight at their points of destination, or to direct the passengers as to the mode of exit, so that they may get off the train while it is standing at the station.

2. CARRIERS (§ II K 1—210)—FAILURE OF RAILWAY COMPANY TO OPEN VESTIBULE DOOR AT STATION—PASSENGER ALIGHTING FROM MOVING TRAIN—RATE OF SPEED.

Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination and the passenger in his efforts to get off the train went to the next coach to find an open vestibule from which to alight, and the train was, by that time, pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceed-

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ing to make it manifestly dangerous for the plaintiff to attempt to get off, and such course on his part was not contributory negligence.

[*Keith* v. *Ottawa and New York R. Co.*, 5 O.L.R. 116, applied.]

3. APPEAL (§ VII L 2—476)—REVIEW OF FINDING AS TO NEGLIGENCE—CONFLICTING EVIDENCE.

Upon a question of fact, as to whether the rear vestibule and trap doors of a day car of a railway train, on which car the plaintiff was riding, were closed while the train was standing at a certain station; where the jury balances the probabilities, (*a*) on the testimony of the defendant company's conductor and brakeman for the negative and (*b*) on that of the plaintiff and a disinterested witness for the affirmative, and finds on that point for the plaintiff, such finding is within the jury's province and will not be disturbed.

4. CARRIERS (§ II K 1—212)—ALLOWING PASSENGER TIME TO ALIGHT—STARTING TRAIN PREMATURELY—CLOSED EXITS.

Where a railway company negligently closes a passenger's natural means of getting off a train, without notice to him, such company is guilty of negligence in starting the train before the passenger has sufficient time to get off by the means he adopts, provided such means be reasonable.

5. CARRIERS (§ II G—100)—DUTY TO HOLDER OF FIRST OR SECOND CLASS TICKET—USE OF PULLMAN FOR PURPOSE OF GETTING OFF TRAIN.

A passenger in a day coach who finds the ordinary mode of exit at the rear vestibule closed at his destination, and who thereupon enters the adjoining Pullman car in search of an opened vestibule, is not a trespasser as to such Pullman coach so as to disentitle him to damages for personal injuries received in alighting therefrom.

6. NEGLIGENCE (§ II A—78)—PASSENGER ALIGHTING FROM TRAIN—EMERGENCY—QUICK DECISION.

Where the negligence of a railway company, operating a passenger train, forced a passenger into an emergency as to getting off the train at his destination, the fact that the means or method of exit which he, in such emergency, adopts, is not the wisest possible under the circumstances, does not necessarily imply contributory negligence on his part.

APPEAL by the defendants from the judgment in an action tried by Meredith, C.J., and a jury. The plaintiff was a passenger from Toronto to Weston, where, on descending from the train, he fell and was run over by the rear car and lost an arm. The jury awarded him $2,500.

The appeal was dismissed, MEREDITH, J.A., dissenting.

D. L. McCarthy, K.C., for the defendants.

F. E. Hodgins, K.C., and *A. C. Heighington*, for the plaintiff.

GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Meredith, C.J., and a jury in favour of the plaintiff. The action was brought to recover damages caused to the plaintiff while a passenger on the defendants' rail-

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way, by reason of insufficient provision to enable him to properly and safely alight from the train upon which he was travelling, upon its arrival at Weston station.

The plaintiff and his friend, John Gibney, had left Toronto together, bound for Weston, a station a few miles to the west of that city, where the train arrived a little before midnight. They were seated in a passenger coach of the ordinary description, so far as appears, connected at its rear end with a Pullman coach, the whole being what is called a vestibuled train. There was a door of exit at each end of the passenger coach. The forward door was open, but there was conflicting evidence whether the rear door also was open.

The plaintiff and his friend tried the rear door near which they had been sitting, and finding it as they say locked, they passed through the Pullman coach, and alighted from the rear platform of that coach after the train had commenced to move; Mr. Gibney, who was first, alighted without difficulty, but the plaintiff in alighting immediately afterwards fell and was severely injured. In passing through the Pullman coach they met the porter, who was apparently in charge. He asked if they desired to get Pullman accommodation, and getting a negative reply did not order them out or attempt to turn them back or otherwise prevent them from proceeding to the rear platform as they did.

It is not claimed that the stop at the station was not of sufficient length to have enabled the plaintiff and his friend to alight under ordinary circumstances.

At the close of the evidence for the plaintiff, counsel for the defendants moved for a nonsuit, which was reserved, and renewed at the close of the whole case, when this took place:—

Mr. Hellmuth:—I would submit that on the whole case——

HIS LORDSHIP:—I am entirely against you. I think the defendants are liable. You put them on this train; you invited them to alight; when they went to the proper place to alight they could not get exit from the car. They were not bound to remain on the car. They went to see if they could find some place of exit, and finding none, they made their best way out.

Mr. Hellmuth:—I think, with great respect, that all the cases proceed on the ground of invitation, and where they find, as they say they did, a closed door and trap-door down, there was no invitation.

HIS LORDSHIP:—I will rule the other way. What question of fact is there in this case to submit to the jury?

Mr. Hellmuth:—The time the train stopped.

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HIS LORDSHIP:—Is there any other important question than whether Gibney and the plaintiff are right as to the condition of the vestibule between the second day car and the first Pullman? What I propose to do, unless there is some objection that strikes me as formidable to it, is to ask the jury just the one question, whether the vestibule was closed, as the defendants say, or whether it was as the plaintiff and Gibney say—and as to the damages—and any other question I will determine without the aid of the jury.

Mr Hellmuth:—I suppose those are questions of law more than of fact.

HIS LORDSHIP:—Yes, largely. Of course, the evidence as to the time the train stopped there varies very much from a minute and a half to three minutes. I suppose nobody could say—I do not know how that is—nobody could say that these men had not time enough to get off.

Mr. Heighington:—No, I do not think we will contend we had not time to alight if the doors were open.

HIS LORDSHIP:—Does not the whole case turn on whether the door was closed, and then the question of law as to whether in the circumstances the men were justified in doing as they did? The only question there that might be asked the jury is whether they did what was right under the circumstances; but I think I will pass upon that. I will just ask the jury to assist me on one question of fact and the damages.

Mr. Hellmuth:—I do not know that I can object to that. Of course, my accepting your Lordship's doing that does not mean that I would be bound by the findings as to this.

HIS LORDSHIP:—Certainly not.

Accordingly the only questions submitted to the jury were (1) was the rear door closed, to which they answered "Yes," and (2) the amount of the damages, which they fixed at $2,500, for which amount the plaintiff has judgment.

The case involves one or more rather nice questions, but upon the whole I do not see any good ground upon which we can interfere. The defendant cannot complain of the somewhat unusual course adopted at the trial, because counsel assented. All that now seems open is the question whether there was reasonable evidence to justify the inferences and findings made by the learned Chief Justice, and I find it impossible to say that there was not. The plaintiff had in the absence of timely information to the contrary a right, it seems to me, to expect to find the rear door of the passenger coach open, in which case he could easily have alighted there in the time allowed. He might even have gone after finding the rear door closed, to the front door which was open—and still have alighted in plenty of time. Instead, he

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proceeded through the Pullman coach, into which, it may be conceded, he had no right under his ticket to enter. But that is not the real question. He had a right to alight from the train, and having at last reached an opening from which he could alight, the real question must, I think, be, might he then alight, the train having commenced to move—in other words, was what he did under all the circumstances reasonable? In the opinion of the learned Chief Justice it evidently was, and I am not prepared to differ from that conclusion. It is easy to say after the event that the plaintiff would have escaped injury if he had gone to the front door instead of the rear door, or to the front door after finding the rear door fastened, as upon the findings of the jury it must now be assumed it was. But the time allowed for deliberation was at the best very short, and finding the rear door closed, it was almost as easy to reach the rear of the Pullman coach as to return to the front door of the passenger coach. It is not to be forgotten that it was the act of the defendants' servants in failing to open or to keep open the rear door which put the plaintiff in the difficulty. Nor is it an answer in law to say that the train being again in motion the invitation to alight was thereby cancelled. Allowance must be made for the very natural desire of a passenger not to be carried beyond his destination, especially at so late an hour. It must, therefore, always in such cases and under such circumstances be a question of the reasonableness of what was done, a question which was rather recently considered in this Court in *Keith* v. *The Ottawa R. Co.*, 5 O.L.R. 116.

I, therefore, see no alternative but to dismiss the appeal with costs.

MACLAREN, J.A.:—The chief dispute was whether the vestibule doors at the rear of the day car, in which the plaintiff and a friend were riding, were open or closed while the train was standing at the Weston station. It was assumed throughout, that if these doors were closed it would be negligence on the part of the company. The conductor and the brakesman of the train swore that they had remained open as usual from Toronto, and were only closed after the train started from Weston. Plaintiff and his companion, Gidney, swore that they were in the rear seat of the rear day car, that when "Weston" was called out, and the train was slowing down they arose and went into the rear vestibule, and finding all the

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doors closed, Gidney tried first to open the doors at the rear of the day car, and finding them "stuck" he next tried those at the front of the first Pullman with a like result. He then rushed into the Pullman car followed by the plaintiff, and passing the porter hurried into the rear vestibule, reaching it just as the train was starting. Gidney opened these vestibule doors and descended safely to the ground east of the station platform. Plaintiff following him closely tried to do the same, but stumbled and fell under the rear car near the eastern end of the platform with the result stated.

The learned Chief Justice, with the acquiescence of counsel, submitted only two questions to the jury, reserving to himself the decision of the other points in the case. The two questions and the answers of the jury were: "(1) Were the trap doors down and the vestibule doors closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston? A. Yes. (2) At what sum do you assess the plaintiff's damages? A. $2,500."

Meredith, C.J., thereupon held that the plaintiff had acted reasonably in what he did, and that there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for him to attempt to get off the way he did, and entered up judgment for $2,500. The evidence was that the train was going at the rate of three or four miles an hour when the plaintiff fell. The finding of the Chief Justice as to the danger is quite in accord with the principles laid down by this Court in *Keith* v. *Ottawa and New York R. Co.*, 5 O.L.R. 116, which is some respects is similar to this case, and the correctness of his decision on this point was not challenged by the defendants either in their reasons of appeal or the oral argument before us.

Counsel for the defendants, however, claimed that on the evidence the jury should not have found that the rear vestibule and trap-doors of the day car in which plaintiff was riding were closed during the time the train was standing at Weston station. On the one hand they had the conductor and brakesman (two interested witnesses) swearing they were not; while on the other they had the plaintiff and Gidney (only one of them interested) swearing the opposite, and giving particulars of Gidney having actually tried to open them before the

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train started. They believed the latter, as it was their privilege to do, and no sufficient reason has been given to us to interfere with their verdict on this point.

While the counsel for the defendants as just stated did not criticise the holding of the trial Judge as to the speed of the train not making it manifestly dangerous or negligent for the plaintiff to attempt to alight, he did urge very strongly that, as the plaintiff had only a first class ticket he had no right to enter the Pullman at all, that he was a mere trespasser to whom the company owed no duty (probably the first time on record in which such a claim was put forward), and that the vestibule and trap doors being closed, there was not only no invitation to him to alight that way, but an express prohibition to attempt it.

I do not think the fact of the plaintiff being only a first class passenger has anything to do with the present case. A first class, or even a second class passenger, may have a right under certain circumstances to pass through a Pullman car in embarking upon, or alighting from, or in simply passing through a train. The question is, did he act reasonably? It may be noted here that there is no evidence that the plaintiff knew this car was a Pullman until he had got some distance inside and saw the berths made up, and by that time he was much nearer the exit in the rear and would know that he could reach it much sooner than that in front, if such a thought as turning back had then occurred to him.

Bearing in mind that the only point on which there was a conflict of evidence has been disposed of by the verdict of the jury, what are the proved facts that are material to the case? The plaintiff after the brakesman called out "Weston" as the train was slowing down, went to the proper place for him to alight, no notice having been given to him to go elsewhere. Finding all the doors closed, his companion who was in front tried first to open the vestibule doors of the day car, and finding them "stuck," next tried those of the front of the Pullman with a like result. Then they started to go through the Pullman car. It was agreed that he could have turned back and gone to the front of the day car. He did not know that that was open to him any more than the place they had just tried. It was perhaps even more natural that they should continue to press on in the direction in which they had started, rather than retrace their steps. But plaintiff from his experience knew that

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the train stopped only one or two minutes, and he had now only some seconds to make his exit. A man who in such an emergency comes to a decision that may not be the wisest is not on that account necessarily negligent. It was quite natural that he should follow his friend where the way was apparently clear, and where the friend made his way out in safety. Although the defendants had negligently closed him in, it was his duty to make all reasonable efforts to get off, rather than to remain passive and then seek damages from the company for having carried him beyond his destination. The company having negligently closed his natural means of getting off the train, without notice to him, were guilty of negligence in starting the train before he had sufficient time to get off by the means he adopted, which under the circumstances was not a negligent or unreasonable or improper way or method, and the injury he sustained was the direct result of such negligence. I can find no sufficient ground for reversing the finding of the trial Judge.

The appeal in my opinion should be dismissed.

MEREDITH, J.A. (dissenting):—The learned trial Judge, with the expressed assent of the defendants, and the tacit assent as well, no doubt, of the plaintiff, withdrew this case from the jury and determined it altogether himself, with the exception of the single question: "Was the trap-door down and the vestibule door closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston?" and the assessment of damages; and so the case stands in a very different position upon this appeal now than it would stand if the case had been tried in the more usual way—if the jury had been required to find, and had found, upon all the material questions of fact involved in the case.

The jury's answer to the one question was "Yes"; and they assessed the damages at $2,500; findings which must stand, because there was evidence adduced at the trial upon which reasonable men might so find; and there is no appeal against a jury's finding.

But in regard to all other material facts, there is an appeal; and this Court is bound now to consider such facts, and if they prove to be, plus the findings of the jury, insufficient to support the judgment directed at the trial, to be entered in the plaintiff's favour, it cannot stand.

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There is no finding of negligence on the part of the defendants, by the jury, nor indeed, expressly by the Judge; nor, if such negligence, that it was the proximate cause of the plaintiff's injury. The mere fact of this particular door being closed "when the train came to a stop" might be evidence of care rather than lack of care. It may be that the jury, if asked, would have found that it was not open at all during that stop. But they have not done so. The evidence of the plaintiff and that of his companion at the time is not very clear in regard to this. They say that they rose from their seats before the train had quite stopped, and went to the platform and found the outer doors closed; that the plaintiff's companion made an effort to open them but could not, and that they then went on through the next car, a Pullman, reaching its rear doors and opening them and getting off when the train was again in motion: the time during which the train was actually stopped is variously put at from one minute and a half to three minutes, the plaintiff's companion testified to about a minute and a half; and so it seems difficult to account for the plaintiff's movements during that time, unless it was nearly all spent in vain efforts to open the doors, though neither testified to anything pointing to more than a few moments' stay there. If it were proper that a way out through that door should have been provided, that duty would have been performed if the doors were opened after the train stopped and kept open long enough to enable passengers having ordinary diligence and care to alight. But it may be that if the jury were right in their finding, then those doors were not open at any time during the stop; and the evidence of the conductor, as well as that of the brakeman, respecting them is untrue, and yet it might have been better if the question had not been limited to the time "when the train came to a stop."

Assuming, however, that the finding ought to be that no reasonable means of alighting from the train was afforded at those doors, during that stop, was there negligence on the part of the defendants in that respect?

Any finding upon the whole evidence upon this question is that there was. The defendants did not at the trial take the position that it was not their duty to passengers to provide a way out by the doors in the rear of the car in which the plaintiff was; the whole of the testimony in their behalf points in the other way; it was to the effect that those doors are always kept open for that purpose until that train leaves the station at which

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the accident occurred, and that they were to open so that the plaintiff might and should have passed through them in alighting on the occasion in question.

Then was the neglect of the trainmen to open them, or to have them open, the proximate cause of the plaintiff's injury? I am unable to say that it was; feeling constrained to find that the want of ordinary care on the part of his companion and himself, on the contrary, was the cause of this most regrettable accident.

Finding no way out by the rear doors, and that some of those doors were so fastened that they could not be opened, which need have been the work of a few seconds only, their course seems to me very plainly to have been, to pass through the car they had occupied, and in which they had a right to be, and find a way out at its front door; all of which might have been done more than five times over even at the lowest estimate of the duration of the stop—a minute and a half. That car they had a right to be on and to pass through; the sleeping car they had no right to be on or to pass through under ordinary circumstances. They had not paid for passage in it; those only who had, had a right to be there; and had a further right not to be disturbed by those who had not; and especially not to be disturbed when they had retired or were retiring; only an invitation or an emergency would justify that which the plaintiff and his companion did. What excuse have they for invading that car at that hour of the night? The right to alight might justify it if that were the only reasonable way of alighting; but that is not so; the contrary is the fact; as all who travel upon our railways must know. Sleeping cars are generally if not invariably "vestibuled" as it is called; and the vestibules are more generally closed than in ordinary cars because those travelling short distances are not in the habit of travelling in sleeping cars. The protection of those occupying sleeping cars requires vestibuled cars; and the safety which the closed vestible affords might be converted into a trap if passengers from any part of the train were permitted to open them, at their will or for their convenience, without the knowledge of any of the train's crew.

In addition to all this the plaintiff and his companion saw and passed by the porter of the sleeping car in going through it, but without asking from him to be afforded means of alighting, as I think, even if they had had a right to be there, they should have done. It was within the power of any of the train

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hands to stop the train and afford a means of alighting and that should and would be done, doubtless, in a proper case; the mere pulling of a signal cord with which all train hands are familiar would have stopped the train.

But having had time enough to go through their own car many times over and so far as the evidence shews not having attempted to go that way at any time, but, instead, having invaded the sleeping car at almost the last moment, and opened its closed doors, and so far as the evidence shews properly closed doors, and got off when the train was in motion, I am quite unable to see how the plaintiff can justly recover damages from the defendants for injuries sustained through a mis-step in attempting so to alight.

To say that the plaintiff was imprisoned is, of course, drawing the long bow; with one door of a sixty-foot car wide open the imprisonment is imaginary. Nor can it be said that the defendants failed to have their train sufficiently manned; four persons to aid possibly hardly more than eight or ten persons to alight ought to be sufficient.

I am unable to see any just ground upon which the judgment in the plaintiff's favour can be supported. Whether it could have been supported if the jury had found sufficient facts to sustain a judgment is a question which it is not necessary to consider.

MAGEE, J.A., concurred in the result.

Appeal dismissed, MEREDITH, J.A., *dissenting.*

FARM CROSSING.

SAINDON v. TEMISCOUATA R. CO.

(Q.R. 41, S.C. 337.)

(*Translation.*)

Quebec Superior Court, Lemieux, A.C.J., Pelletier, and Dorion, JJ.
Quebec, December 29, 1912.

RAILWAYS (§ II B—21—LEGAL SERVITUDE—RAILWAY ACT, SECS. 252, 253 —CROSSINGS FOR THE CONVENIENCE OF LANDS OVER WHICH RAILWAY IS CARRIED—RIGHTS AND OBLIGATIONS OF THE COMPANIES AND OF THE PROPRIETORS.

Held, the crossings which railway companies are bound to make for the convenience of the lands over which the line is carried, is a legal servitude, and the proprietors are not obliged to establish a title,

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When a railway company has once provided crossings which it recognizes as being necessary, it cannot abolish one, under the pretext that one crossing was sufficient. The Board of Railway Commissioners has no power to declare that an existing crossing is useless.

THE judgment inscribed in review, and affirmed, was delivered by the Superior Court, Cimon, J., September 20, 1911.

December 29, 1911. LEMIEUX, A.C.J.:—On September 11, 1889, the Temiscouata Railway Company acquired from the plaintiff Saindon's predecessors in title, for the purpose of constructing it line of railway, a strip of land across lot No. 30.

At that time, that is, during the construction of its road, the company established, and has ever since maintained, until the date of the suit at bar, that is to say, during twenty-two years, two crossings for the convenience and use of the proprietors of the Saindon farm. The farm is worth $4,000. It is four arpents and four perches wide.

Shortly before the present suit, and despite the objections of Saindon, the company closed one of the farm crossings. Saindon claims $225 damages for the closing of the crossing, resulting in inconvenience in the working of his farm.

The amount of damages allowed by the trial Court, $125, is not in dispute before us.

The only contention of the company in this Court is that the farm crossing in question is a burden upon it, that it constitutes a servitude and that it is within its rights in seeking to be relieved of it, in view of the fact that the servitude was created without a title and that Saindon has shewn no title of recognition on the part of the company.

The trial Court set aside this argument and maintained the action. We think the judgment well founded.

We are not in presence here of a servitude created by act of man or by contract, but of a statutory or legal servitude, in support of which no title is necessary.

The Railway Act, ch. 37, R.S. of C., section 252, provides, "Every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railway for farm purposes."

A glance suffices to shew that the statute is absolute, imperative, and requires railway companies, as a legal obligation, to provide not only one crossing, but as many crossings as may be necessary, useful or convenient for the purposes of the farm across which the railway is carried.

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The company defendant recognized this legal obligation when building its road, by providing three crossings. It did not act in that way by caprice or philanthropy, but by the obligation to observe the strict letter of the law and for the use, convenience and accommodation of the Saindon farm.

The company submitted to this obligation during a period of twenty-two years, and during all that time maintained those crossings.

By the deed of purchase, or by the deed expropriating part of the Saindon farm, the company is not specifically bound to make and maintain crossing; the deed does not provide for a right-of-way, but it states what is the equivalent, namely, that the company binds and obliges itself to discharge all the obligations incumbent upon it under the Railway Act; that is to say, the obligation of providing farm crossings, as required by section 252.

It was understood in that sense by the manager of the company, when, before suit was brought, he wrote and addressed the following letter, in English, to the solicitors for the plaintiff: "Some years ago, this company bought the right-of-way across the property in question and provided two crossings and enclosed the right-of-way with fences. . . . We consider one crossing to be sufficient for Saindon and are only prepared to furnish one crossing."

The words "provided two crossings" in the letter mean, according to the best dictionaries, that the company built and gave two crossings to Saindon. "To provide," according to a dictionary which I have consulted, means "to supply with what is needed," that is to say, that the company had built two crossings which were necessary.

We do not look upon this letter of the manager as a recognition of a servitude, but simply as an admission, in any event useless for the purposes of this suit, that the company had granted and given to Saindon and had supplied his land with two crossings, because, in the language of the statute, they were proper, convenient, and useful, for farm purposes.

If under the statute, the company is not bound in the circumstances, to maintain the crossing which has been closed, because the plaintiff finds himself without a title creating a legal servitude, it might, for the same reason, close the only crossing which remains upon the Saindon farm.

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The statute is opposed to any such arbitrary acts on the part of railway companies, particularly when they are prejudicial to the owners of property.

In the case at bar, the company is in an unenviable position in closing a crossing after it has existed for twenty-two years, and during the whole of which period it had maintained it.

It has been represented to us that the Board of Railway Commissioners has decided that this crossing was unnecessary.

Under section 253, ch. 37, R.S. of C., it is well within its competency for the Board of Railway Commissioners to order a railway company to provide and construct proper farm crossings, but, it is without jurisdiction, under the same statute, to deprive an owner of acquired rights, particularly when he would suffer prejudice, as in the case at bar.

The prejudice is so clearly admitted that the company, neither in the trial Court nor in its factum filed before us, thought it the part of prudence to object to the indemnity of $125 granted by the trial Judge.

The judgment is well founded, and we affirm it with costs.

L. Talbot, for the plaintiff.
H. Cimon, for the defendant.

RICHARDS & BENNETT v. GRAND TRUNK RY. CO.

(File No. 13227.)

Board of Railway Commissioners. June 22, 1912.

RAILWAYS (§ II B—21)—CROSSING IN THE NATURE OF A FARM CROSSING —ACCESS TO HIGHWAY—CONSTRUCTION AND MAINTENANCE—GATES.

The Board granted a crossing in the nature of a farm crossing from the applicants' lands to a highway upon condition that all expenses of construction and maintenance be borne by the applicants and that gates be established, which must be kept closed, on both sides of the railway.

[*New* v. *Toronto, Hamilton & Buffalo Ry. Co.*, 8 Can. Ry. Cas. 50, followed.]

APPLICATION to direct the respondents to provide a suitable farm crossing from applicants' lands to a certain highway.

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The application was heard at Windsor, June 22, 1912.

J. H. Rodd, for the Applicants.
W. H. Biggar, K.C., for the Respondents.

The facts are fully set out in the judgment of the Assistant Chief Commissioner, delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER:—In this matter the applicant applies for a direction that a farm crossing be established, or a way in the nature of a farm crossing, a sort of continuation of Strabane avenue.

It is contended by the railway company that the applicant has a right to use Labadee's crossing a short distance away. Labadee disputes that. He has taken legal proceedings to prevent the applicant from using this crossing.

We went out there this morning and saw the layout on the ground; we saw Mr. Labadee and discussed the matter with him. He claimed very forcibly that it was his lane and his lane only, and he wants a sum, which I think is a prohibitory sum, to allow anyone else to use it.

We saw that there was clearly some kind of a crossing over the railway at the continuation of Strabane avenue. We have heard the evidence of Mr. Askin, who owned the property, that there was a farm crossing at that point, which he used for years, and which he never relinquished. He says it was closed by the railway company without his leave or license, or in fact without his knowledge, until the work had been done.

We are of the opinion that Richards and Bennett should have access to their property. There is some legal doubt as to whether they have the right to use the Labadee lane or not. We are not in a position to decide that. I do not think it is incumbent upon us to do so. There clearly was a crosing at one time at the point where a crossing is now applied for.

Of course the parties now applying are not the same as those who enjoyed it at the time it was opened.

We are of the opinion that a crossing in the nature of a farm crossing should be given to Richards and Bennett, and we impose the condition that they do all the work at their own expense. Of course, like all other farm crossings, there must be gates, and the gates must be kept shut. The Railway Act imposes the obligation on the party who has a right to use the crossing to keep the gates

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shut, and relieves the railway company from any legal liability if they are left open. The applicants, Richards and Bennett, should understand that their obligation is to keep the gates shut, and that they are responsible to see that they are kept shut; and, that the railway company is not under any obligation in respect thereto.

An Order will go permitting the applicants to construct a farm crossing at their own expense, and establish gates, which must be kept closed, on each side of the railway company's property.

RAILWAY CROSSED BY HIGHWAY.

MISSION DISTRICT BOARD OF TRADE v. CANADIAN PACIFIC RY. CO.

(File No. 15725.)

Board of Railway Commissioners. November 28, 1912.

RAILWAYS (§ II A—18)—RAILWAY CROSSED BY HIGHWAY—MUNICIPALITY—BY-LAW—NEW HIGHWAY—BRIDGE—PROPER AND SUITABLE STRUCTURE—JURISDICTION—COST TO BE BORNE BY MUNICIPALITY.

In dealing with an application by a municipality to direct a railway company to carry a new highway across its tracks by an overhead crossing, the Board's jurisdiction is confined to giving directions as to the structure when railway property is interfered with and upon the municipality passing a by-law providing a proper and suitable structure for the purpose an order will go approving of same, and in such case the whole cost of the new highway will be upon the applicant.

THE application was heard at Vancouver, November 28, 1912.

Charles Wilson, K.C., for the Applicant.
J. E. McMullen, for the Respondent.
Geo. H. Cowan, K.C., for Ratepayers and Residents.

The facts are fully set out in the judgment of the Chief Commissioner, delivered at the close of the hearing.

THE CHIEF COMMISSIONER:—This is the position: The Board cannot open up highways. The municipality is the body that has the right of opening up highways, as and where it pleases, subject to the directions of the Board when railway property is interfered with. That being the case, all that we can do to-day is,

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to say that, if the municipality provides a suitable structure by means of a bridge for carrying a new highway across the tracks, an Order for that will go. We do not care what street it is on. That is a matter you will have to fight out before the proper tribunal.

Mr. Cowan: In this particular case, an Order could not possibly go, because the Reeve of the municipality is speaking of a street which is not within his municipality.

THE CHIEF COMMISSIONER: That is a difficulty we cannot deal with.

Mr. Wilson: Your Order simply gives leave to do a certain thing.

THE CHIEF COMMISSIONER: That is all. If you have not the right to do it, you have not the right.

Mr. Vercheres: The petition shews that the present crossing is not adequate. The petitioners appeal for an overhead crossing, as well as keeping Horne avenue open, and that is outside the municipality; it is an unorganized Government district, so far as we can see, there is a road over the Canadian Pacific tracks on which road we want the Railway Commission to grant us an overhead bridge.

THE CHIEF COMMISSIONER: You do not know where it is. As I pointed out to you, we cannot do that. The municipality, by by-law, makes its highways.

Mr. Vercheres: We are outside the municipality; it is under the Government.

THE CHIEF COMMISSIONER: Then, it is for the Government to say. We cannot do anything more than that. That is all we can say. Just as soon as the municipality passes a by-law for the building of a bridge at any particular spot; then we see that it is a proper and suitable structure; and, if in the opinion of our Engineer, it is, the plan is approved.

In this case, the Government being interested, may possibly contribute towards the cost of the bridge. If not, the whole cost will be upon the municipality, because the proposed road will be a new highway.

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SEPARATION OF GRADES.

CITY OF VANCOUVER v. GREAT NORTHERN AND BRITISH COLUMBIA ELECTRIC RY. COS.

(File No. 20062.)

Board of Railway Commissioners. July 29, 1912.

RAILWAYS (§ II B—10)—SEPARATION OF GRADES—STEAM RAILWAY AND ELECTRIC STREET RAILWAY—APPORTIONMENT OF COST—RAILWAY GRADE CROSSING FUND.

Upon an application by a municipality for an order to carry four streets over the intersecting tracks of a steam railway company, two of these streets being occupied by the tracks of an electric street railway, the Board decided that the cost be apportioned as follows:—

For the streets not occupied by the electric railway, the steam railway to contribute 75%, and the municipality 25% of the cost; for the streets occupied by the electric railway, the steam railway to contribute 60%, the electric railway 20%, and the municipality 20% of the cost, with contributions in three cases from the Railway Grade Crossing Fund of 20% up to $5,000, such cost to include the cost of depressing the tracks of the steam railway, and damages to its lands exclusive of the right-of-way.

THE application was heard at Vancouver, July 29, 1912.

J. G. Hay, for the Applicant.

A. H. MacNeill, K.C., for the Respondent.

L. G. McPhillips, K.C., for the British Columbia Electric Ry. Co.

The facts are fully set out in the judgment of the Assistant Chief Commissioner delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER:—In this matter the Board is of the opinion that the application should be granted for the approval of grade separation at these four streets, Hastings, Pender, Keefer, and Harris.

It was suggested that perhaps one of the streets, or perhaps two of them, might be closed and grades separated at the others. But bearing in mind the marvellous—I think that is not too exaggerated a word—the marvellous growth of Vancouver, it is perhaps wisest at this stage to decide to keep the whole four streets open. And bearing in mind the fact that there will have to be some depression in the tracks of the Great Northern, and bearing in mind the fact that land values are increasing, it is

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better that the four of them should be done at once rather than that the work be done piecemeal. Therefore, having decided that much, it is incumbent on us to say in what proportions the cost shall be borne by the interested parties.

First of all, dealing with Pender and Keefer streets; these are streets which are not used by the British Columbia Electric Railway, and the only parties interested are the City and the Great Northern Railway. It appears that after the streets were laid out the Great Northern put a track across the streets, and subsequently, in 1910, they got permission from the Board to lay two more tracks. The order in that case was No. 12403 and dated on the 6th of September, 1910. Clause two of that order was as follows:—

"That owing to the low-lying nature of the ground through which the said tracks were run, and the probable necessity in future of carrying the said streets or some of them over the said tracks, all questions relating to the separation of grades and the distribution of the cost thereof are hereby reserved."

Now, it is quite clear from that order that the railway company went there with its two additional tracks bearing in mind that the question of grade separation would come up and that it would undoubtedly be called upon to pay a substantial share of separating the grades at those streets. The advent of the Great Northern is undoubtedly of substantial benefit to Vancouver. No one denies that. These tracks are not for passenger purposes but to get down to the water front. That is an undoubted advantage to Vancouver to have the railway facilities of the Great Northern at the water front more or less in competition with the other railway that is there.

Bearing all these facts in mind, we have come to the conclusion with regard to those two streets upon which the British Columbia Electric Railway does not run that the cost should be divided as follows:—

First, we will give as much as we can give out of the Railway Grade Crossing Fund as a contribution towards the separation of grades. The Railway Grade Crossing Fund is a fund established by Parliament some years ago to assist in the separation of grades and highway crossings. That Act has some limitations, and we are not permitted to give more than twenty per cent. of the total cost of the work for any one crossing, and the amount of the contribution for any one crossing shall not exceed $5,000.

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So that in this case it is rather small. A further limitation is that that contribution can only be made for three highways in one municipality in one year. At Pender and Keefer streets we will give $5,000 contributions each out of the Railway Grade Crossing Fund, and we think the balance should be paid, 25 per cent. by the city and 75 per cent. by the railway company.

At the other two streets, Hastings and Harris, all that I have said with regard to the history of the crossings at Pender and Keefer also applies. The circumstance of Hastings and Harris which does not coincide with the other streets is that the British Columbia Electric Railway crosses the steam railway at both these streets. It appears that the British Columbia Electric was some few years prior to the Great Northern with its track at Hastings, but it is said that the tracks were not connected up but were merely laid across.

It appears from the statements handed in by the Great Northern, which are not disputed by anyone, that there is considerable street railway travel at those streets. Take for instance Hastings on 27th of June last, between 8.30 a.m. and 6 p.m., 111 cars; and at Harris street on July 5th, between 7 a.m. and 5 p.m., 138 cars. The average is that at Hastings the street cars pass every five minutes, and at Harris every 4½ minutes, showing a substantial travel over these two streets by the British Columbia Electric.

The British Columbia Electric Railway Company was not originally served but their counsel came forward and said they were aware of what was going on and he waived the lack of notice. If they stood on their technical rights, it would only have meant a delay of a couple of weeks until they were given notice, so I think it is in the interest of all concerned that he should have waived the lack of notice and gone on as he did.

In the operation of their cars, the British Columbia Electric now find three tracks of the Great Northern crossing these two streets. These three tracks of the Great Northern are legally there. Without the intervention of this Board, the British Columbia Electric can do nothing to get rid of these tracks. They have to stop their cars; their conductor has to go forward and give a signal, and then, if the track is clear, they proceed. In addition to that delay in stopping in that way there is the danger of their passengers being killed by an accident occurring at this level crossing. It will undoubtedly be a very substantial benefit to the British Columbia Electric to have this danger

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removed, and to have this delay in their operation removed by the construction of these bridges. It being a substantial benefit to them, we are of the opinion that they should contribute to the cost of the two bridges which they will use. That is the bridges at Hastings and at Harris. Unfortunately we cannot give the $5,000 out of the Grade Crossing Fund to both of these streets, because the Act limits us to a contribution to three streets in one year in any municipality. Therefore, we will say at Harris street we will give $5,000 out of the Railway Grade Crossing Fund and the balance to be divided twenty per cent. to the city, 20 per cent. to the British Columbia Electric, and 60 per cent. to the Great Northern. That same contribution will apply at Hastings, except that, as I have already said, we cannot give the $5,000 of the Railway Grade Crossing Fund.

With regard to the cost of the depression of the tracks of the Great Northern necessary for this work, we think that that cost should be counted in with the cost of the bridges in addition to the land damages. So that in estimating the cost of the work upon which the percentages will be based, the cost of depressing the Great Northern tracks will be included. Any disputes will have to be settled by the engineer of the Board. Detailed plans of each crossing to be submitted for the approval of the Engineer of the Board.

Mr. MacNeill:—I take it that as to land damages the railway company will be in the same position as a private owner.

THE ASSISTANT CHIEF COMMISSIONER:—If you own lands apart from your right of way.

Mr. MacNeill:—It is irregular. In some places more lands were got than are actually occupied by the tracks and they are utilized by industries.

THE ASSISTANT CHIEF COMMISSIONER:—Land damages to your right of way should not be included, but land damages to land that you hold other than your right of way might be included. I suppose the city does not want it stated when this work is to be begun? If you have to submit your by-law to the people.

Mr. Hay:—We will submit our by-law in January. That is the first time we can submit it.

THE ASSISTANT CHIEF COMMISSIONER:—We will make no order as to the time when it shall commence or when the work shall be completed. The city being chiefly interested in the matter, we presume that they will act with due diligence.

Mr. Hay:—Permission being given to the city to construct?

THE ASSISTANT CHIEF COMMISSIONER:—Yes.

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HIGHWAY CROSSED BY RAILWAY.

SASKATCHEWAN LOCAL IMPROVEMENT DISTRICT NO. 161 v. CANADIAN PACIFIC RY. CO.

(File No. 16165.)

Board of Railway Commissioners. July 20, 1912.

RAILWAYS (§ II B—19)—HIGHWAY CROSSED BY RAILWAY—BRIDGE—RAILWAY YARD—APPORTIONMENT OF COST—RAILWAY GRADE CROSSING FUND.

Where an application was made by a Local Improvement District for a bridge carrying the highway over railway tracks, and the limits of an adjoining city were afterwards extended so that the highway became wholly within the city limits, the Board decided that the District should not bear any portion of the cost of such bridge, that the city should contribute $5,000 of the cost for that portion of the bridge which crosses the through tracks of the railway company, who must bear the whole cost of extending the bridge across their yard, 20 per cent. of the cost of the whole bridge to be paid out of the Railway Grade Crossing Fund and the balance by the railway company.

THE application was heard at Moose Jaw, July 20, 1912.

H. D. Pickett, for the Applicant.
J. G. Taylor, for the Respondent.
W. B. Willoughby, for the City of Moose Jaw.

The facts are fully set out in the judgment of the Assistant Chief Commissioner delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER:—In this matter an application was made by the Local Improvement District. At that time this highway was the boundary line between the Local Improvement District and the city. That is, the highway between Ranges 26 and 27 west of the second meridian. Since then the city limits have been extended farther west, and this is wholly now within the limits of the city of Moose Jaw.

Under those circumstances, we do not think that the Local Improvement District should be called upon to pay any share of the cost of the bridge on what is now a city street, in the city of Moose Jaw. Apparently, it is necessary that the bridge should be built and should be built as shewn on this plan submitted by the C.P.R. The only point remaining is to apportion the cost of the work between the parties who are interested. We can give,

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and will give twenty per cent. of the cost of the total bridge out of the Government Fund, that is, the Railway Grade Crossing Fund. The contribution cannot exceed $5,000 under the Act, but twenty per cent. of the total cost of this would be about $5,000.

We feel that there is something in the contention of the city that they are not concerned with the portion of the bridge which covers the C.P.R. yard. The C.P.R. have through tracks there, and the city, of course, should contribute towards the cost of the portion of the bridge which will go over those tracks, but the C.P.R., for its own purpose, is widening out this yard, and we think that the city should not be called upon to contribute any portion of the cost of the bridge covering the yard.

We, therefore, think that the contribution of the city towards the work, bearing in mind what I have said, should be $5,000, the balance to be paid by the railway company; that is, twenty per cent. of the cost of the whole bridge out of the Railway Crossing Fund, $5,000 from the city of Moose Jaw, and the balance to be contributed by the railway company.

The maintenance of the road and the sidewalk on the bridge to be looked after by the city.

CITY OF ST. THOMAS v. MICHIGAN CENTRAL RY. CO.

(File No. 19906.)

Board of Railway Commissioners. October 25, 1912.

1. RAILWAYS (§ II B—17*a*)—HIGHWAY CROSSED BY RAILWAY—STREET RAILWAY—PROTECTION—CONSTRUCTION, INSTALLATION, MAINTENANCE AND OPERATION—APPORTIONMENT OF COST.

The Board granted an application by a municipality for a crossing on the highway of a steam railway by its electric street railway to save a detour of three thousand feet on condition that the applicant pay for its own construction, its own rails, and other work and the diamonds, but the cost of protection, that is, the installation of the interlocking plant, its maintenance and operation, to be borne equally by the applicant and respondent. The municipality was not estopped, and had the right to make the application under the changed conditions, irrespective of any action previously taken by the Board.

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2. RAILWAYS (§ II B—18)—LEVEL CROSSINGS—MUNICIPALITIES AND RAILWAYS—RIGHTS OF.

The rights of municipalities to apply to the Board to open level crossings, in the public interest, are higher and should more readily be given effect to than applications of railway companies to cross highways on the level.

APPLICATION to permit the construction of its street railway across the right of way and tracks of the respondent.

The application was heard at Toronto, September 26, 1912.

W. R. Doherty, for the Applicant.
W. P. Torrance, for the Respondent.

The facts are fully set out in the judgment of Mr. Commissioner Mills.

October 25, 1912. MR. COMMISSIONER MILLS:—This application was made on the third day of June, 1912; and it was heard at sittings of the Board in Toronto, commencing on the 26th day of September, 1912. The locality was subsequently inspected by two members of the Board; and the case now stands for final action.

William street extends north from Wellington street to Talbot street, crossing the Michigan Central Railway one block south of the latter street. It is open across the said railway, properly planked, and now used for vehicular and pedestrian traffic. Centre street is immediately south of the Michigan Central, and parallel with it, running east and west, about thirty-two feet distant from the nearest track; and there is a subway under the Michigan Central tracks at the west end of Centre street, 1,750 feet west of William street.

The St. Thomas Street Railway runs north along William street from the southern portion of the city to Centre street, where it turns west along Centre street to the said subway and then back east along Talbot street to the north end of William street, going two-thirds of a mile out of its way every trip to and from the northern part of the city, where, it appears, a large number of men are employed in the Pere Marquette shops, the Broom and Woodenware factory, the Still Handle factory, the Pork Packing factory, and the Canning factory, as well as in the stores and other business places along Talbot street, from William street on the west to the London and Port Stanley Railway on the east.

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The city alleges that the going round the loop, two thirds of a mile out of its way every trip, seriously interferes with the financial success of its street railway; that many people who have to go only a comparatively short distance north or south, across the Michigan Central Railway, decided to walk rather than take a street car, round the loop; and that the compulsory diversion from William street is an inconvenience and annoyance to many citizens in the northern and southern parts of the city.

Therefore, the city, by vote of the ratepayers and a resolution of the city council, has appealed to the Board for an order permitting it to continue its street railway along William street, across the Michigan Central tracks, laying it one block further north, in order to reach Talbot street without going round the loop.

The owners of certain properties on Centre and Talbot streets, fronting on the loop, with sympathizers and others in different parts of the city, to the number of 177, men and women, petitioned against the proposed change of route, on grounds, real and ostensible, to the effect that it would increase the danger at the crossing on William street; would interefere with farmers driving to a small market place on the west side of William street, immediately north of the M.C.R. right-of-way; and would involve the city in a considerable (perhaps a large) expenditure —all without any benefit in either time or money to the street railway, adding that long freight trains which, at the usual rate of speed through the city, take about five minutes to pass a given point, and would prove a greater hindrance to street railway traffic than the loop in question.

The Michigan Central Railway Company also, very courteously but strongly, objected to the proposed crossing, chiefly for the same reasons as those given by the petitioners above mentioned, emphasizing especially the danger and the cost involved, while maintaining that, if the crossings were made, it would be no benefit to the street railway, and that consequently the city's application should not be granted.

The danger is always the most difficult problem in connection with the crossings of railways over highways at grade or rail level. The question arises whenever a railway company applies for permission to construct a track at grade, through a city, town, village, or country district. Every such crossing over a street or highway increases the danger to the travelling public;

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and yet our country has allowed thousands of such crossings, *in the public interest*, and will continue to allow them, until such time as the country is able to provide for a separation of grades at all railway crossings, or is willing to pay such passenger fares and freight rates as will enable railway companies to make such a separation at all points.

In like manner, whenever a city, town, village, or rural municipality opens a street or highway, or constructs a street railway, across a steam railway, at grade, it increases the danger to the travelling public; nevertheless many such crossings have been authorized and must continue to be authorized, so long as the *public interest* demands them, a city or other municipality having as good a right as a railway company in all such cases.

Further, when a railway company has secured its right of way, it has therein certain rights which must not be ignored. It has the right to lay tracks and sidings thereon; which right it exercises almost *ad libitum;* and it never hesitates to press for permission to cross streets, at grade or otherwise, as it thinks proper, when constructing additional main line, siding, or branch line tracks: and it should not be forgotten that municipalities, likewise, have certain rights as to the use of their streets and highways; and these rights should not be overlooked or lightly disregarded.

No doubt there often is ground for difference of opinion as to what *the public interest* is in a particular instance. In this case, the city of St. Thomas, after openly and legally consulting the people—the *public* in that locality—has applied to the Board for permission to construct its street railway across the Michigan Central Railway, at grade, on one of its streets, claiming the right to make such crossing on the ground of public interest and convenience, while the Michigan Central Railway Company and certain petitioners allege that the public using the streets of St. Thomas would not be benefited financially or in any other way by the proposed crossing; so the Board has to weigh the evidence and arguments for and against.

Whether or not the crossing in question would prove financially helpful to the St. Thomas Street Railway is a matter of opinion. The affirmative opinion of the city was formed, not hurriedly but after consultation and apparently due consideration by the people and their official representatives; and, for that reason, I feel myself in duty bound to consider it at least

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as likely to be correct as the opinion of any other of the parties interested in the case. It is no doubt true that the street cars would sometimes be held up by the passing of long Michigan Central freight trains over the William street crossing, as vehicular and pedestrian traffic is now held at that point, for, say, five minutes at a time; but such interruptions are not regular but occasional, whereas the delays caused by running round the loop are constant, affecting every trip made by the Electric Railway.

It was suggested that a subway might be constructed under the Michigan Central Railway tracks on William street; but the cost of that method of crossing would, I think, be prohibitive, on account of the position of Centre street, which, as stated above, is parallel to the Michigan Central Railway and so close that it would add directly to the cost of the subway, and would involve land damages east and west of the crossing, in addition to the damages on William street. I think, therefore, that the idea of a subway at that point may as well be abandoned for the present at least; but it happens that all Michigan Central Railway trains pass through St. Thomas under strict control and at a comparatively low rate of speed; so, with derails on the street railway and home and distant signals on the steam railway, all properly connected with the block system of the latter and operated by the street railway, it would be practically impossible for an accident to occur at the crossing.

Therefore, in view of the evidence, arguments, and circumstances, including the fact that William street is already open across the Michigan Central and regularly used for vehicular and pedestrian traffic, my opinion is that the city of St. Thomas should be permitted to construct its street railway across the right of way and tracks of the Michigan Central Railway on William street in the said city: plans showing the installation and the method of protection to be submitted for approval by the Chief Engineer of the Board; the long market-shed west of William street and north of the Michigan Central Railway, to be moved by the city, at its own expense, to the north or west side of the market square, in order to improve the view at the crossing; and the expense of the construction and maintenance of the crossing and the appliances connected therewith to be borne and paid jointly by the city of St. Thomas and the Michigan Central Railroad Company, one-half by each, the city being senior as regards the street and junior as regards its railway.

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October 30, 1912. MR. COMMISSIONER MCLEAN:—In this matter I expressed an opinion at the hearing that the situation should be looked after by a subway. The ideal solution of the Michigan Central location at St. Thomas would undoubtedly be grade separation throughout. As to the William street crossing I am now satisfied that I did not give sufficient weight to the complication created by the location of Centre street and the additional burden of cost this would add.

I, therefore, agree in the recommendations of Commissioner Mills without expressing any opinion as to the obligations, if any, arising from the street railway being junior at the proposed point of crossing to the Michigan Central.

January 6, 1913. THE CHIEF COMMISSIONER (dissenting):—I have had the advantage of reading the considered judgment of Mr. Commissioner Mills in this case. I entirely agree with the general principles which he lays down. Certainly, municipalities have as great a right as railway companies to have granted to them, on their application, level crossings. I would go further and say that their rights, being rights which they exercise as a general thing in the interests of the public and apart from any selfish reason, are higher and should be more readily given effect to than those of the railway companies. My only difficulty here is in the application of the principle. If this present application was being made by an electrical railway company, I would, without hesitation, refuse it, on the ground that, with the subways already in existence, it is entirely unnecessary to add to the dangers of the present level crossing by adding to its burden street railway operation.

The facts are very simple and allow of no dispute. Mr. Doherty states that, operating through the subway at Pleasant street, as now constructed, three thousand four hundred feet is travelled in making the loop; while, if the present application is granted, and the railway constructed across the Michigan Central tracks, the distance from point to point is but four hundred feet; so that a saving of three thousand feet in distance when the cars run will be made in the street car system in operating over the grade crossing on William street.

The unit cost of street operation in St. Thomas is not given; but from the evidence I have heard in other matters, it may be said to vary from fourteen to twenty cents per car mile; and placing it at twenty-four cents, which, perhaps, would not be

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unreasonable in a small system, there would be a saving made of eight cents in each run by each car.

In addition to this there is a further argument made by Mr. Doherty, more or less problematical, that greater earnings can be had from the street car system if the run is made more direct.

If an incorporated company was asking for this crossing merely to get rid of a comparatively short distance of unproductive mileage, with the possibility of increasing its dividends, I am quite convinced that no answer whatever would have to be made to the application. It would be and should be refused.

It is a mistake to think that, simply because there is now a level crossing, there is no objection to the use of that crossing by street carriers. A street car, like a steam railway, has to be operated on a given line. Its operation is always carried on subject not only to the danger of ordinary traffic, but to the added dangers of being unable to change its course, and the possibility—indeed, the almost certainty—of trouble from greasy rails. There is no comparison of the danger to which an individual is subject to in walking over a railway crossing, on the one hand, and that he is exposed to as being a passenger in an electric car crossing it, on the other.

In my view, the application should be refused; but as Mr. Commissioner McLean agrees with Commissioner Mills, the usual Order will go for a level crossing, protected with derails, plans of which are to be submitted to the Board's Engineer for approval; the cost of the work to be apportioned as in the Edmonton case; that is, the city will pay for its own construction, its own rails and other work, and the diamonds; but the cost of protection, that is, the installation of the interlocking plant, its maintenance and operation, to be borne equally by the city and the railway company.

I perhaps should mention the legal matter raised by Mr. Torrance. Mr. Torrance pointed out that when the Ross street subway was ordered, there was also an application for a subway at William street; that the William street subway was withdrawn as a term to the Order under which the Ross street subway was built and that the city is estopped in the present application. As intimated in the argument, in my view, no estoppal whatever was created. The action taken was the action of the Board; and the municipality now has the right to make the application under the changed conditions now existing, as it now does, irrespective entirely of anything which happened in connection with the Ross street subway.

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HIGHWAY CROSSED BY RAILWAY.

CITY OF LETHBRIDGE v. CANADIAN PACIFIC RY. CO.

(File No. 18908.)

Board of Railway Commissioners. December 20, 1912.

HIGHWAY CROSSED BY RAILWAY — STREET RAILWAY — TEMPORARY AND PERMANENT CROSSING—CONSENT OF RAILWAY COMPANY—CONSTRUCTION OF PERMANENT WORKS.

Upon an application to have a temporary right of crossing the tracks of a steam railway with the tracks of a municipal electric railway made permanent, where the highway crossing was permanent, and the respondent steam railway company had originally consented to the temporary crossing and thereupon permanent works had been constructed by the municipality, the Board made no order but directed that unless there was an elimination of grade or change in the street car location a system of derails should be installed against the electric car line on account of the dangerous character of the crossing.

THE application was heard at Lethbridge, December 11, 1912.

W. S. Ball, for the Applicant.
G. A. Walker, for the Respondent.

The facts are fully set out in the judgment of the Chief Commissioner.

December 20, 1912. THE CHIEF COMMISSIONER:—It is contended, on behalf of the Canadian Pacific Railway Company, that this crossing is particularly dangerous and should not have been installed. The company is probably right. It is situated near the station yards and exposes those using the electric cars to a good deal of danger, undoubtedly. But this objection is not one which comes with very great force from the railway company. The danger now is no greater than when they consented to an order going for a crossing. It is true the railway company urges that its consent was only for temporary use; but under that consent permanent works have been constructed by the municipality, public moneys spent, and, doubtless, new houses have been built or property acquired in that part of the city across the tracks by individuals relying on the street car service.

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No order will be made at present extending the time for the operation of the electric line across the tracks. The time allowed by the Board does not expire until the 28th day of May of next year. In the meantime, the city and railway engineers will consider (as they have promised me), a proper solution of the difficulties at the point in question.

It should be understood by all parties that, unless there is elimination of grade, or a change in the street car location, a proper system of derails, set against the electric line, will have to be installed.

The Canadian Pacific Railway Company's engineers in dealing with the question should also bear in mind that, while the Electric Railway crossing was only for the year, the highway crossing itself is permanent, with a good deal of traffic over it, and is at a dangerous point, as shewn by the claims of the railway company itself.

MR. COMMISSIONER MCLEAN concurred.

UNJUST DISCRIMINATION.

BRITISH CANADIAN CANNERS v. GRAND TRUNK RY. CO.

(File No. 19823.)

Board of Railway Commissioners. July 3, 1912.

CARRIERS (§ IV C 4—541)—UNJUST DISCRIMINATION—STOP-OVER PRIVILEGES—CANNERS—DIFFERENT LOCALITIES.

The Board held that it was unjust discrimination to grant stop-over privileges to canners in one locality and refuse them to canners in another locality.

APPLICATION to direct the respondent to extend the stop-over privileges on canned goods now enjoyed by canners at points west of Toronto to canners at two points east thereof.

The application was heard at Ottawa, July 3, 1912.

John Dryden, for the Applicant.
W. H. Biggar, K.C., for the Respondent.

The facts are fully set out in the judgment of the Assistant Chief Commissioner delivered at the close of the hearing.

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THE ASSISTANT CHIEF COMMISSIONER:—The railways operating from the Niagara Peninsula westward in Ontario now grant stop-over privileges to the Dominion Canners Company, and, I suppose, to any other company operating there, but chiefly to the Dominion Canners Company; and the application is made by their competitors, the British Canadian Canners, asking for stop-over privileges at two points east of Toronto, that is, at Bowmanville and Cobourg.

The Board is of the opinion that the circumstances existing to-day amount to an undue preference in favour of the territory west of Toronto to the prejudice of these two points, Bowmanville and Cobourg.

Without deciding on the merits of the question of stop-overs, and without deciding any general principle at all, we are of the opinion that, there being an undue preference to the detriment of Bowmanville and Cobourg, the application for stop-over at Bowmanville and Cobourg should be granted.

Mr. Dryden: Mr. Chairman, how about other canning factories east of Toronto; would they be included in that?

THE ASSISTANT CHIEF COMMISSIONER: The only application before us is for stop-over at these two points. We have granted that.

MONTREAL BOARD OF TRADE v. CANADIAN FREIGHT ASSOCIATION.

(File No. 7346.1.)

Board of Railway Commissioners. February 14, 1913.

1. CARRIERS (§ IV C 4—542)—UNJUST DISCRIMINATION—BETWEEN LOCALITIES—TOLLS—COMMODITY—FIFTH CLASS—HIGHER BASIS—COMPETITION.

The fifth class tolls on wire fencing from Montreal, westbound being on a higher basis than the commodity tolls, on shipments moving from Ontario points eastbound, there was unjust discrimination against the Montreal manufacturer in competition with the Ontario manufacturer.

2. CARRIERS (§ IV C 4—543)—UNJUST DISCRIMINATION—TOLLS—REDUCTION—REASONABLENESS.

The application of Montreal manufacturers for a reduction in tolls below the fifth class on shipments to points on the branches north of the main line of the Canadian Pacific, Montreal to Toronto, and north

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of the Grand Trunk main line, Toronto to Sarnia, was refused because all manufacturers shipping to the northern localities were subject to the fifth class, and the Board was not dealing with the reasonableness of the tolls, but with unjust discrimination against Montreal.

3. CARRIERS (§ IV C 3—535)—TOLLS—PARITY—LONG AND SHORT HAUL—COMPETITION.

The tolls to points midway between Montreal and Toronto and to certain points at the same distance from Montreal as others from Toronto, were placed on a parity, but to points immediately west of Montreal a reduction below fifth class was refused because the advantage of the shortness of the haul against the long haul of the competing Ontario manufacturers would result in equalizing the tolls.

THE application was heard at Ottawa, November 5, 1912.

W. S. Tiltson, for the Applicant.

C. A. Hayes, for the Respondent.

W. M. Kirkpatrick, for the Canadian Pacific Ry. Co.

The facts are fully set out in the judgment of the Assistant Chief Commissioner.

February 14, 1913. ASSISTANT CHIEF COMMISSIONER:—Before dealing with the merits of this application, it might be well to point out briefly the history of wire fencing rates in Ontario for some years back. After order No. 3258, in what was called the International Rates Case, was issued by the Board, the Canadian Freight Association through its advisory committee pointed out to the Board that the lowering of the class rates brought about by the decision of the Board in the International Rates Case had the effect of making the 5th class rates lower in some instances than the existing commodity rates on wire fencing, and asked the Board's permission to cancel the commodity rates with certain exceptions. As a result of that application, order No. 6844 of the 6th April, 1909, was issued. The rates fixed by that order are found in tariffs G. T. R.—C. R. C. E-2548, and C. P. R.—C. R. C. E-2124. These tariffs provide rates out of Toronto, Hamilton, Woodstock, Walkerville, and Windsor. At the time these rates were fixed no wire fencing was manufactured in Montreal, and therefore possible shipments from that point were not considered.

Some years ago the manufacture of wire fencing by the Steel Company of Canada was commenced at Dominion, a suburb of Montreal, and an application was made to the railway companies for rates lower than 5th class for wire fencing out of Montreal.

In a letter, dated March 4th last, from Mr. Hayes, the then chairman of the advisory committee of the Canadian Freight

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Association, an application was made to the Board for the rescission of order No. 6844, which fixed commodity rates on wire fencing from the Ontario points above mentioned so that the 5th class rate would become applicable on all movements of wire fencing in Ontario. This application was made because the railway companies realized that owing to the establishment of a wire fencing manufacturing plant near Montreal some change in the rates was necessary. When that application came before the Board it was made to appear that the rate from Windsor to Montreal of 22c. was the same as the rate on plain wire and barbed wire from Pittsburg to Montreal, and that both barbed and plain wire entered this country free of duty. Evidence was also given to show that the price of wire fencing had been materially reduced within the past ten years, and that during that time the volume of the movement of wire fencing had very much increased. With these facts before it the Board dismissed the railway companies' application, but no reasons for judgment were given.

We now have the present application for a reduction in the rates from Montreal westward. It cannot be denied that with wire fencing moving from Ontario points of manufacture eastward on commodity rates, and wire fencing manufactured in Montreal moving westward on 5th class rates, which are on a higher basis than the commodity rates, the Montreal manufacturer is unjustly discriminated against.

The railway companies, realising the position of affairs, have offered to make the following reduction in their rates:—

"That westbound rates should be published from Montreal on the basis of the eastbound rates to Montreal, as follows:—

To	
Walkerville Sarnia	22c.
Woodstock	21c.
Toronto Hamilton	18½c.

"These rates to be applied as maxima to intermediate points on the direct lines, and the rates to all points in the territory west of Toronto, south of the main line of the Grand Trunk Toronto to Sarnia, to be adjusted in fair relationship to the above-mentioned points."

This is agreeable to the applicant in so far as it goes, but the

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Board of Trade asks in addition that it be granted a reduction in the rates below the 5th class to points on branch lines north of the main line of the C. P. R. from Montreal to Toronto, and north of the main line of the Grand Trunk from Toronto to Sarnia, where the commodity rates which have been given the western manufacturers do not apply. I do not think this feature of the application should be granted. The Board is striving to do away with the undue preference which western manufacturers have over Montreal. This preference does not exist in localities such as those mentioned where the commodity rates do not apply. We are not dealing with the reasonableness of the rates per se, but with the undue discrimination against Montreal. There is no undue discrimination where both parties are subject to the 5th class rates.

The Board of Trade also asks for a reduction in the 5th class rates out of Montreal to points west thereof. As far as the territory immediately west of Montreal is concerned, there is no necessity for the Board's intervention because the shortness of the haul gives the Montreal manufacturer a substantial advantage; but, with regard to points further west, some re-arrangement will have to be made.

If the Sarnia and Walkerville rates on the one hand and the Montreal rate on the other are to be put on a parity in respect of the shipments involved, then the rates between Montreal and Toronto should be scaled on substantially the same basis as is used in scaling east of Toronto to Montreal. I use the word "substantially" because, as has been said, there is no need for a further reduction to the points immediately west of Montreal. The re-arrangement recommended may be taken care of as follows: the commodity rate from Montreal to Kingston (approximately the midway point) should be the same as from Toronto; and from Montreal to Port Hope and Peterborough the same as for the approximately similar distances from Toronto to Cornwall; the Port Hope, Peterborough, and Toronto rates should be the maxima to intermediate points; and the commodity rates from Montreal should cover the same points as those from Toronto, on the above-mentioned basis.

I think an order should go that the railway companies file tariffs, to be effective on or before the 1st April, establishing commodity rates westward out of Montreal, on the basis and for the territory which they intimated they were willing to do as described in the railway companies' answer quoted above, and

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also re-arranging the rates between Montreal and Toronto on the basis above suggested.

THE CHIEF COMMISSIONER, and COMMISSIONERS MCLEAN and GOODEVE concurred.

MONTREAL BOARD OF TRADE v. GRAND TRUNK AND CANADIAN PACIFIC RY. COS.

(File No. 17819.)

Board of Railway Commissioners. January 14, 1913.

1. CARRIERS (§ IV C 4—546) — UNJUST DISCRIMINATION — AGAINST COMMODITIES—MILEAGE BASIS—DIFFERENT COMMODITIES.

   Putting the tolls on cornmeal on a mileage basis by reducing them from 17½c. to 15c. per 100 lbs., from Montreal to New Brunswick points, would be unjust discrimination against the Maritime millers, and these tolls should not be disturbed.

2. CARRIERS (§ IV C 4—535) — UNJUST DISCRIMINATION — AGAINST COMMODITIES.

   It did not appear that there was any such essential difference between the commodities corn and wheat and oats as would justify a higher toll basis in the case of corn.

3. CARRIERS (§ IV C 3—535)—REASONABLENESS OF TOLLS—EX-LAKE—REDUCTION—COMPETITION BY WATER.

   It has not been shewn that either in point of water competition, or in point of conditions affecting carriage, there was such a difference of condition as to justify the discrimination between the ex-lake toll on corn and that on wheat, oats, and barley, and corn should, therefore, be given the same treatment as the latter, where an ex-lake toll on it was in effect.

APPLICATION to direct the respondents to reduce the toll on ex-lake corn to the same basis as in effect on ex-lake wheat, barley and oats, from Georgian Bay ports to Montreal, and to direct the Canadian Pacific Railway Company to apply the mileage basis, as in effect in Ontario and Quebec, on cornmeal, from Montreal to points on that Company's line in New Brunswick.

The application was heard at St. John, July 9, 1912.
Written statements were also submitted to the Board.

W. S. Tilston, for the Applicant.
C. A. Hayes, for the Grand Trunk Ry. Co.

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W. M. Kirkpatrick, for the Canadian Pacific Ry. Co.
J. R. Stratton, for the Maritime Millers.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

January 14, 1913. MR. COMMISSIONER MCLEAN:—The judgment dated March 6th, 1912, stated that the application as launched was not a tenable one. At the same time, direction was given that the railway should be asked to justify the apparent discrimination as between the wheat and oats rate and the corn rate from Georgian Bay ports to Montreal. It was stated:—

"It appears, however, that the corn rate from Tiffin to Lindsay and from Tiffin to Peterborough is the same as the wheat and oats rate, while from Tiffin to Montreal the corn rate is 11½c. as compared with the wheat and oats rate of 10c. In view of the extension of the wheat and oats rate to Lindsay and Peterborough, it is not apparent why the same treatment should not be given to Montreal. It does not appear that there is any such essential difference between corn and wheat and oats as would justify a higher rate basis in the case of corn."

Attention was also drawn to the fact that the rate from Montreal to St. John was apparently out of line as compared with the rate from points west of Montreal to St. John, and direction was given that the railway should be required to speak to the question why the Montreal-St. John rate should not be reduced from 17½c. to 15c.

As a result of this hearing, the majority of the Board concurred in the position that the cornmeal rates from Montreal to St. John points should not be disturbed.

On May 11th, 1912, Mr. Tilston, for the Montreal Board of Trade, made application for a rehearing, which would also afford an opportunity for the protests already made by the Maritime milling interests against the proposed reductions of the rates, but which had not been presented in evidence to be considered.

As a result of this, the matter was set down for rehearing in St. John. The position of the Maritime milling interests was in part presented. As it was desired by some of the interests represented to make fuller statements than could be put in at the hearing, an opportunity of doing this by means of written statements was afforded. This method of procedure, on account of the time necessarily taken up by written answer and reply, is

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usually dilatory. And it was as dilatory as usual in the present application.

Full consideration of the evidence presented, as well as of the submissions subsequently presented in writing, convince me that the Board acted properly in refusing to direct a reduction from Montreal to St. John. This position may be re-affirmed.

There remains for consideration the question of the ex-lake rates on corn, which was not dealt with in the judgment of the Board already referred to. As pointed out by Mr. Tilston at the hearing, the ex-lake rates on corn, for milling, are identical with those on wheat, barley, and oats, for milling, for all distances up to 325 miles, at which point the rate is uniformly 10c. per 100 lbs.. This 10-cent rate is continued on wheat, barley, and oats down to Montreal, which is 382 miles by the Grand Trunk from Tiffin; and when, in the near future, the C. P. R. opens its new line to Port McNicoll, its distance will be 369 miles. On the other hand, the corn rate advances to 11c. up to 350 miles, and to 11½c. beyond that to Montreal.

This is a question of discrimination as between the rates on corn and the wheat and oats rate. It was contended in substance by Mr. Kirkpatrick, for the railway, that the 10-cent wheat and oats rate was a competitive one against water carriers, and that in the case of corn the same conditions did not present themselves. It may be noted, as already pointed out, that the corn was given the same basis as wheat and oats from Tiffin to Lindsay and Peterborough.

If the controlling power of water competition is relied upon as a justification of the difference in treatment, it would normally follow that to some extent the water controlled rate would fluctuate with its controlling rate. But the 10-cent rate has been in force unchanged for some years. It applies not only to Montreal and as a maximum to intermediate points, but also to points on the north shore from Aylmer down to Montreal, including the branches, and to points on the Brockville-Ottawa and Prescott-Ottawa sections. But the pervasive power of water competition on this rate is further minimized when it is remembered that it was originally an arbitrary rail proportion of a through rate from Fort William. It had its origin when grain was handled on through rates from Fort William, via lake and and rail, and this figure was approximately, if not actually, allowed for the rail haul from the Georgian Bay. As a result of the improvement in the facilities for handling grain to Mont-

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real, all water, it became expedient to allow the lake carrier to protect rates on the Bay ports as they found necessary to meet fluctuating competitive conditions, and the rail carriers accepted the fixed rate of 10c. per 100 lbs. from the Bay ports.

It has not been affirmatively shown that either in point of water competition, or in point of conditions affecting carriage, there is such a difference of condition as to justify the discrimination between the ex-lake rate on corn and that on wheat, oats, and barley. The corn should, therefore, be given the same treatment as the latter, where an ex-lake rate on it is in effect.

THE ASSISTANT CHIEF COMMISSIONER and COMMISSIONERS MILLS and GOODEVE concurred.

BRITISH COLUMBIA SUGAR REFINING CO. v. CANADIAN PACIFIC RY. CO.

(File No. 19700.)

Board of Railway Commissioners. February 21, 1913.

CARRIERS (§ IV C 4—542)—UNJUST DISCRIMINATION—BETWEEN LOCALITIES—TOLLS—REDUCTION—COMPARISON—TOLL BASIS—EAST AND WESTBOUND—COMPETITION.

An application that the alleged unjust discrimination in favour of Eastern refineries be removed and for lower freight tolls from Vancouver to all points in Alberta and Western Saskatchewan, raises the point: Is the diffeence in rate basis eastbound over the mountains from the Pacific Coast justifiable as compared with the rate basis from Montreal and from the head of the lakes westbound? which is part of the pending Western Rate Investigation, and a ruling will not be given on this particular case in advance of the ruling on the general case.

[*Regina Board of Trade* v. *Canadian Pacific and Canadian Northern Ry. Cos.* (*Regina Toll Case*), 11 Can. Ry. Cas. 380, referred to.]

THE application was heard at Vancouver, July 27 and 29, 1912.

L. G. McPhillips, K.C., for the Applicant.
W. B. Lanigan, for the Respondent.
Geo. H. Shaw, for C.N.R. Co.
H. H. Hansard, for G.T.P.R. Co.

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The facts are fully set out in the judgment of Mr. Commissioner McLean.

February 21, 1913. MR. COMMISSIONER MCLEAN:—Complaint is made that the action of the Canadian Pacific, the Canadian Northern, and the Grand Trunk Pacific Railway Companies by reducing their fifth-class rates from their lake front termini to points in the Provinces of Manitoba, Saskatchewan, and Alberta, such reductions having become effective April 1st, 1912, has subjected the applicant to increased eastern competition. Applicant has applied unsuccessfully to the Canadian Pacific Railway for corresponding rate reductions on sugar from Vancouver to points in the Provinces of Alberta and Saskatchewan. The rate reduction which it is alleged has detrimentally affected the applicant is a result of the Board's order in the Regina Board of Trade Case.

The contentions of the applicant are bound up with a case which was before the Board in 1908, viz., the *Complaint of the British Columbia Sugar Refining Company, Limited, regarding rates on sugar from Vancouver to Manitoba, Saskatchewan, and Alberta points, as compared with the rates from Montreal. File* 6759. The applicant in the present case contends that rates should not be reduced from the east without its obtaining corresponding benefit; and it states that each reduction in fifth-class rates from the east means a contraction in area in which it can profitably conduct its business. It states that "It would be manifestly unjust that such a state of affairs should exist in Saskatchewan, which by its geographical position may be reasonably considered as part of our territory, that is to say, a province much closer to British Columbia than to Quebec, and one from which we have long been expecting a large and increasing business." The applicant's position in regard to the effects of this increased competition, alleged to be the result of the rate reduction, is set out in the following language:—

"Our interests must be so adversely affected by these reductions that we claim our position should be considered before lower rates are made from the east, or that no reduction should be put in force from the east unless we are given corresponding advantages."

In developing its case, applicant points out that rates per ton per mile from Port Arthur to points in the Western provinces are much less than from Vancouver to Alberta points,

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and it gives as an exemplification of this the following statement:—

	Miles	Rate	Per ton per mile
Vancouver to Calgary	646	$0.75	$2.32
Fort William to Moosomin	639	.57	1.78
Vancouver to Red Deer	739	.82	2.22
Fort William to Indian Head	734	.67	1.82
Vancouver to Lloydminster	967	1.08	2.23
Port Arthur to North Battleford ...	1,009	.83	1.64

The applicant also applies for an order directing the Canadian Pacific Railway to obey the instructions of the Board as set forth in its order No. 4886 of June 16th, 1908. It is contended that the directions contained in the aforesaid order regarding the reasonable scaling of rates from Vancouver to intermediate points in Manitoba, Saskatchewan, and Alberta were not carried out. Further, in drawing attention to the reduction in rates resulting from the all-rail tariff effective April 1st, 1912, from Montreal to various points in the west, it states that the disadvantages it labours under would be properly corrected by an order directing the Canadian Pacific to comply with the provisions of the order above referred to, especially as to scaling rates. Applicant also asks for an order directing the Canadian Northern and Grand Trunk Pacific Railways to issue joint tariffs with the Canadian Pacific Railway establishing lower rates from Vancouver to points on their respective lines.

It is not necessary to enter in detail into the question as to whether the provisions of the Board's order No. 4886 were verbally complied with. The order was, perhaps, somewhat loosely drawn. The clear intent which was intended to be embodied in the order is contained in the report of the Board's Chief Traffic Officer, which was adopted as the judgment of the Board in the matter; and what was done by the railways in putting in the tariffs in question was in substantial compliance with the recommendations of the Board's Chief Traffic Officer.

While the matter should not be dealt with in a technical way, attention may be drawn to the fact that the scaling referred to in the order was to be carried out "satisfactorily to the Board." The order, which went without formal hearing, reserved to either party the right to apply to rescind or vary the order. Subsequent to the issuance of the order, an application

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was made on July 27th, 1908, by the Canadian Pacific for a rehearing. Under date of July 29th, 1908, the president of the Sugar Company wrote a letter stating that the tariffs filed only partially carried out the orders; but no application was made by him for a rehearing. Subsequently, on October 17th, 1908, the application of the railway for a rehearing was withdrawn.

It is not suggested that any rights the applicant may have had under the order in respect of a rehearing have been lost by laches. But the four years which have been allowed to elapse, coupled with the conditions of the present application, sufficiently differentiate the present situation from that which was dealt with under order No. 4886.

In so far as the applicant is relying upon the Board's order No. 4886 as having created a rate basis which must now be enforced, it must be borne in mind that the original application and the order resulting therefrom were concerned with all-rail rates from Montreal versus the all-rail movement from Vancouver. It is true that on March 21st, 1908, and May 6th, 1908, for example, the Sugar Company complained of reductions being made by lake and rail westbound, without corresponding reductions being made from Vancouver eastbound; but while this feature is introduced, it is evident from the tenor of the complaint that what was relied upon was a comparison of the all-rail rates from Montreal west and the all-rail rates from Vancouver east to points where competition arose; and it was with this phase of the condition that the order of the Board, as well as the report of the Chief Traffic Officer, dealt.

The former complaint was wider in scope than the present. As has been seen, it is contended that it is in Alberta and Saskatchewan that the competition has been specially increased as a result of the rate reductions. It is alleged that in Manitoba the applicant company is in a disadvantageous situation from the standpoint of competition, but this phase of the matter is not developed with any degree of particularity.

As to the situation in Saskatchewan and Alberta, the Assistant Chief Commissioner, who presided at the first hearing of the present application, asked for information regarding the respective tonnage movements from Vancouver and from Fort William to Alberta and Saskatchewan points. A statement submitted by the Canadian Pacific Railway subsequent to the first hearing shows that between April 1st and August 31st, 1912, 16,100 tons of sugar went forward from Vancouver to Alberta

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and Saskatchewan points, while 170 tons went forward from Fort William to points in the same territory, that is to say, as between these two sources of supply Vancouver supplied 98.9 per cent. The figures submitted by the Canadian Northern show, giving per cent. totals, that in the period April 1st to July 31st, 1912, 89.66 per cent. of the sugar going to C. N. R. points in these provinces was from Vancouver. To check up the figures so obtained the Board asked for additional information as to the movement prior to April 1st, when the tariffs complained of became effective, and was informed by the Canadian Northern that for the six months ending April 1st, 1912, the movement from Vancouver to same provinces represented 80.5 per cent. As the applicants have not had an opportunity of checking these figures, nothing will be built upon them.

Application has been received from Mr. Tilston, who desires to intervene on behalf of the Montreal Board of Trade. A similar application was received from the Knight Sugar Company of Raymond, Alberta, which said:—

"We kindly ask you to send us particulars of their application, and why they want the present rates reduced, as we are certainly interested in sugar freight rates coming into this territory.

"While it is only part of the B. C. refineries market, it is our entire market, and any information you can give us on the above will be appreciated, and we thank you in advance for the same."

For the reasons indicated in a later portion of this memorandum, it is not now necessary to deal with these two applications.

As has been stated, order No. 4886 dealt with all-rail rates, not only because the application was essentially concerned with this, but also because the Board appreciated that in the lake and rail movement there entered a factor which was not common to the movement from Vancouver, a factor which, further, was to a considerable extent independent of the control of the Board. This is emphasised in the present application which refers to an 18-cent rate of the Canadian Lake Line applicable to sugar from Montreal to Port Arthur and Fort William for furtherance. This, as well as other independent lake carriers, is not subject to the Board's jurisdiction.

The consideration then of the former order does not advance the present situation. So far as the all-rail rates are concerned,

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Mr. Beatty in his answer gives the following comparisons, which are not contested:—

To	From		Difference in favour of Vancouver, B.C.
	Montreal, Que., All rail, 5th Class, Tariff E 1920; C.R.C. E.2320.	Vancouver, B.C., Special Tariff No. W. 2141; C.R.C. W.1428.	
Regina.....	$0 99	$0 75	$0 24
Moose Jaw....	1 02	75	27
Saskatoon....	1 09	95	14
Edmonton....	1 33	82 plus $10 per car	51 less $10 per car
Red Deer.....	1 34	82	52
Calgary.....	1 33	75	58
Lethbridge...	1 27	80	47
Strathcona...	1 33	82	51

(Rates in cents per 100 lbs.)

The applicant is in reality treating Fort William and Port Arthur as initial points of shipment. It states that because of the warehousing facilities supplied there, it is feasible for the eastern refiner to ship in on the lake rate during the summer, and by forwarding from these points during the season when navigation is not open practically to spread the effect of the lake and rail rate over the whole year's movement. This may be and no doubt is to a considerable extent true, but a comparison of the rates from Fort William and Port Arthur westward with the rates from Vancouver eastbound is an integral portion of the Vancouver Board of Trade Case which was made a part of the pending Western Rate Investigation. The applicant asks "for this discrimination to be removed" and for lower "freight rates to all points in Alberta and Western Saskatchewan." The complaint of the Vancouver Board of Trade raises exactly the same point as is raised by the applicant in the present case, namely, is the difference in rate basis eastbound over the mountains from the Pacific coast justifiable as compared with the rate basis from Montreal and from the head of the lakes westbound? It is, therefore, impossible to give any ruling on a particular case in advance of the ruling on the general case. The application, therefore, must stand to be dealt with as an integral part of the general investigation.

The CHIEF COMMISSIONER concurred.

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JURISDICTION.

ST. JOHN & QUEBEC RY. CO. v. CANADIAN PACIFIC RY. CO.

(File No. 19077.1.)

Board of Railway Commissioners. December 31, 1912.

1. CARRIERS (§ IV A—519)—JURISDICTION—PROVINCIAL RAILWAY—RAILWAY ACT, SECS. 176, 227, 229—1 & 2 GEO. V. CH. 11—2 GEO. V. CH. 49.

The St. John & Quebec Ry. Co., a Provincial Railway Company having applied to the Board under sections 227 and 229 of the Railway Act for authority to connect its tracks with those of the Canadian Pacific Ry. Co. and operate its trains over them between certain points, to rearrange certain tracks of the Canadian Pacific Ry. Co., construct and operate switches from its lines at certain points, and make other physical changes.

The Board refused the application on the ground that the benefits of the provisions of the Railway Act allowing one railway company to use the lines and appliances of another can only be given to Dominion railways, and that the statutes 1 and 2 Geo. V. (1911), ch. 11, and 2 Geo. V. (1912), ch. 49, do not place the applicant railway under the jurisdiction of the Board.

Preston & Berlin Street Ry. Co. v. *Grand Trunk Ry. Co.*, 6 Can. Ry. Cas. 142, followed.

THE application was heard at Montreal October 29, 1912. Written arguments were subsequently filed with the Board.

Hon. W. C. H. Grimmer, K.C., Attorney-General of New Brunswick, for the Applicants.

E. W. Beatty, for the Respondents.

The facts are fully set out in the judgment of the Chief Commissioner.

December 31, 1912. THE CHIEF COMMISSIONER:—This is an application made by St. John and Quebec Railway Company for an Order allowing that company to connect its tracks with those of the Canadian Pacific Railway at two points indicated on a plan submitted for consideration, and permitting it and its lessees to operate their trains over the tracks of the Canadian Pacific Railway between the points at which the connections are sought to be made, a distance of some 1.91 miles; to rearrange the Canadian Pacific Railway's switching spur track so as to place it south of the line of the applicant company; to construct and operate switches from the tracks of the Canadian Pacific Railway Company at the points shown on the plan; to remove the Canadian Pacific Railway's spur connection between

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Victoria Mills and the Canadian Pacific Railway's main line, and arrange for a re-location of the spur so as to connect with the tracks of the applicant company; and authorizing the Canadian Pacific Railway to operate its switching engines between certain points, subject to the rules and orders of the applicant company.

The Board, owing to the question of jurisdiction, does not deal specifically with the merits of the application under its various headings. In some instances, the applicant company is asking too much, particularly when it seeks to place itself in the position of a senior instead of a junior road; but, on the larger issue, that is, as to whether or not running rights should be obtained over the Canadian Pacific Railway's tracks by the St. John and Quebec Railway Company, either on the existing line or on double-tracks, the request is reasonable.

An engineer of the Board took the matter up personally with the engineers of the different companies; and the applicant company is, as stated by its engineer, willing to double-track the Canadian Pacific Railway from Fredericton station to Victoria, and to give the Canadian Pacific Railway Company control of the operation of both tracks. This solution of the difficulty would not, in my view, be at all unfair to the Canadian Pacific Railway Company. It is in the public interest, and I think an appropriate Order might be made, were the applicant company subject to the jurisdiction of the Board.

I have carefully considered the memorandum which has been submitted by the Honourable the Attorney-General of the Province of New Brunswick, in which he seeks to distinguish between this case and that dealt with by the late Chief Commissioner, the Honourable Mr. Justice Killam, in his judgment in the case of *The Preston and Berlin Street Railway Co.* v. *The Grand Trunk Railway Co.*, 6 Can. Ry. Cas., p. 142.

As I read it, the Act of 1903, section 137, which allows one company to use the lines and appliances of another, subject to the approval of the Board, can be construed only as the learned Chief Commissioner construed it; the effect, of course, being that the benefits of the provisions of the section can be extended only to railways within the authority of this Board; that is, one authorized by the Dominion Parliament, or declared by that Parliament to be a work for the general advantage of Canada.

By the Act of 1906, the old section 137 is revised; and the rights that one company may acquire over the tracks, etc., of

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another company are more clearly defined in section 176. The benefits of the section are not, however, extended to Provincial Railways.

The Honourable the Attorney-General refers to Statute 1-2 George V., 1911, chapter 11, and Statute 2 George V., 1912, chapter 49, as placing the railway under the jurisdiction of the Board and enabling the Board to make the Order asked for. I have carefully considered both Acts; and I am unable to admit the validity of the argument. The first Act merely authorizes the lease of the railway when completed, with its appurtenances, and its operations as part of the Government Railway System of Canada for a period of ninety-nine years. There is nothing in the Act either which directly or indirectly places the railway under the jurisdiction of the Board, or renders it subject to the provisions of the Dominion Railway Act. As a matter of fact, the railway is not being constructed under the provisions of that Act. Section 2 merely enables the directors of any railway company within the legislative authority of the Dominion to enter into the contract; and, there being no such company, this section does not in any way support the contention of the applicant company.

The second Act referred to, does not, in my view, place the railway under the jurisdiction of the Board. It is an Act providing for a subsidy to this railway; it does not provide in any way for its construction, or give the company the right to take advantage of the construction sections of the Railway Act. It does, however, provide that the rates and tolls charged by the company in respect of the structures subsidized, shall be approved by the Governor-in-Council. This, in my view, goes no further than the usual provisions to be found in Acts granting subsidies to local companies, which have never been, in the past, construed as divesting those companies of their character as Provincial undertakings. The provision, indeed, does not go so far as sub-section 3 of section 258 of the Railway Act, which provides that every railway subsidized by the Dominion shall provide and maintain stations, furnish facilities, etc., as designated and defined by the Board. The effect of this provision, however, is yet to be held as creating a general Dominion jurisdiction.

The fact also adverted to by the applicant company, that this railway is to be operated as part of the Intercolonial does

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not aid the applicant company, because Government Railways are expressly excluded from the application of the Act.

In my view, the object aimed at can perhaps be accomplished under the legislation of 1911, amending section 228 of the Act. Under this, with proper Provincial legislation, while it is not at all clear that the application as made would be within the jurisdiction of the different Boards, yet it is manifest that, a physical connection between the systems being made, regulations may be provided for the safe and proper transfer of engines and equipment, and for the reasonable forwarding and delivery of traffics, which will probably be sufficient for the purposes of the applicant company.

COMMISSIONERS MILLS and GOODEVE concurred.

MERVIN BOARD OF TRADE v. CANADIAN NORTHERN RY. CO.

(File No. 11929.15.)

Board of Railway Commissioners. January 25, 1913.

1. CARRIERS (§ IV A—519) — GOVERNMENT CONTROL — JURISDICTION OF BOARD OF RAILWAY COMMISSIONERS—COMPLETION OF RAILWAY—LOCATION PLANS—APPROVAL—OPENING FOR TRAFFIC—APPLICATION FOR.

The Board has no jurisdiction to entertain an application for the completion of a line of railway where the route map has been approved. Its jurisdiction is confined to approval of the location plans and upon application to open the railway lines for traffic when constructed.

THE application was heard at Edam, Sask., November 19, 1912.

G. E. Newbauer et al., for the Applicants.

The facts are fully set out in the judgment of the Chief Commissioner.

January 25, 1913. THE CHIEF COMMISSIONER:—Complaint has been made by farmers and others in the vicinity of Mervin, Saskatchewan, as to lake and railway facilities at that point.

Mervin is a point on the North Battleford branch of the Canadian Northern Railway, some twelve miles north of Edam. The

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company's route map has been submitted to the Minister of Railways, and has been approved by the Minister from North Battleford to Athabasca Landing, a distance of about two hundred and fifty miles. The railway company has submitted to the Board its location plans from North Battleford to a point called Emmaville, a distance of about twenty-two miles from Edam. As a matter of fact, railway construction has been carried only as far as Edam. Complainants state that settlers have gone into the country generally along the line of the proposed route, and that there are farms now under cultivation forty or fifty miles distant from Edam. They further state that at Mervin, the townsite of the Canadian Northern Railway system has been laid out and land sold on the strength of the statement that the steel would be carried to it. Mr. MacLeod, the general manager of the railway company, stated that it was the intention of the company to lay steel to Mervin, and that the work would have been done, had it not been for the fact that the company undertook so much work that some of it had to be left over. There does not seem to be any doubt but that land, to some extent, was sold as the complainants stated; and the map issued by Messrs. Davidson and McRae, general agents of the railway company's lands, shows this branch as a line in operation, not only to Mervin, but to a point some ten miles north of it, probably intending to show the construction as far as the Board has approved of the company's plans.

There is no question at all but that the line is most urgently needed; that many of the farmers who appeared before the Board at Edam, would probably be better off if they had broken no land and attempted to market no wheat under the adverse conditions which they are now suffering from. But the Board can do nothing. The building of these lines is a matter fixed only by the special Act and by agreements made with the different Governments interested. The Board can do nothing, except facilitate the work when asked, and it has done everything, in this particular instance, that it can do until the lines are constructed and an application is made to open them for traffic. The only reason no action is taken here is a lack of jurisdiction. So far as the necessities of the district are concerned, and the position that settlers find themselves in, there is no doubt that the railway should be built, and built at once. So far as the sales of land are concerned, again the Board is

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without the slightest jurisdiction. As matters stand at present, townsites may be opened by anybody, anywhere, and lands sold on prophecies as to what will take place in the future, so far as railway development, station location, and other facilities are concerned—or anything else.

In this particular instance, I unreservedly accept Mr. MacLeod's explanation as to the facts, and am quite sure that there was no intention of reaping the benefit of a sub-division at Mervin on the assumption of a railway development which was not intended. In other words, this construction was in contemplation and it was expected that the work would be done; but, as stated by Mr. MacLeod, owing to weather conditions and shortage of labour, the railway company did not accomplish so much tracklaying as was anticipated by its officials.

The Provincial Government is interested in the matter, and the line is one that it is assisting. The Board has taken the matter up with that Government and notes of the evidence have been supplied to it. In addition to all this, Mr. MacLeod has stated that the line will be built this season. The settlers at Mervin and other parts of this district will have to content themselves with Mr. MacLeod's statement. The Board can make no order, because it has no jurisdiction.

COMMISSIONER MCLEAN concurred.

MUNICIPALITY OF ASSINIBOIA v. CANADIAN NORTHERN RY. CO.

(File No. 21193.)

Board of Railway Commissioners. December 16, 1912.

1. RAILWAY AND TRAFFIC BRIDGE—JURISDICTION—MUNICIPALITY—HIGHWAY —REPAIR AND MAINTENANCE.

   The Board has no jurisdiction to decide a dispute between a municipality and a railway company as to which of them is liable for the repair and maintenance of a combined railway and traffic bridge, which ends on railway property, on both sides of a river, and whose approaches run over a municipal highway; the matter is entirely between the railway company and the provincial authorities, who aided in the construction of the bridge.

2. RAILWAY AND TRAFFIC BRIDGE—REPAIR AND MAINTENANCE—USUAL RULE.

   The usual rule in such cases, apart from special circumstances is that the railway company is responsible for railway structures, and the municipality for structures handed over to it for municipal and highway purposes.

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THE application was heard at Winnipeg, December 16, 1912.

C. Isbister, for the Municipality of Assiniboia.
T. A. Hunt, for the City of Winnipeg.
O. H. Clarke, K.C., for the Canadian Northern Railway Co.

The facts are fully set out in the judgment of the Chief Commissioner delivered at the close of the hearing.

THE CHIEF COMMISSIONER:—This is a matter in which the Board, with the material before it, cannot do anything.

The municipalities are, in the first instance, responsible for the care of their highways. They are responsible not only for their maintenance, but they are also responsible in damages for anyone injured by reason of their non-repair. In this particular case, I am not going to say that this highway is in the position of an original highway. I am not going to say anything which might prejudice the municipality in any action or proceeding which it might desire to take.

As a matter of fact, there is that technical point, which can be taken and is open to the municipality to take, that this bridge ends on Canadian Northern Railway property, on both sides of the river; but I am afraid that point is not of much importance to it, because the approach, which forms part of the structure and is necessary to the highway construction in both directions, runs over the municipal highway.

The Board can, however, do nothing, because the matter, as shewn by the evidence, is entirely between the Provincial authorities and the railway company. The Provincial authorities assisted in the building of the structure for the purpose of getting the highway approach for the municipality. That assistance may or may not have covered maintenance. If it did, the fact will be made clear, I have no doubt, by the records of the local Government.

The usual rule, apart from any such record, is that the railway is responsible for railway structures; and the municipality, for structures handed over to it for municipal and highway purposes. So the proper party to consult is the head of the Department that made with the railway company the agreement which resulted in the building of the bridge.

Mr. Hunt:—I may say, Mr. Chairman, that the municipality of Assiniboia has already an application pending before the Mun-

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icipal Commissioner of the Province of Manitoba with reference to this bridge; and it seems that the bridge is not legally constructed. That is another question, you see.

THE CHIEF COMMISSIONER:—Well, it is with the local authority, whether the Commissioner or the Department; it is really in the hands of the local Department, as a structure built on a highway by agreement with the local Government.

CHAMBERS OF COMMERCE FEDERATION v. SOUTH EASTERN RY. CO.

(File No. 20218.)

Board of Railway Commissioners. January 6, 1913.

JURISDICTION—NON-EXISTENT RAILWAY—RECONSTRUCTION — RE-OPEN FOR TRAFFIC—FACILITIES—PORTION OF RAILWAY—OPERATION—ANOTHER RAILWAY.

The Board has no jurisdiction to entertain an application where the wrong complained of happened ten years before the Board was constituted, nor can it compel a railway company, the successor in title of the respondent, to reconstruct and re-open for traffic, with proper facilities, a portion of its railway which has become non-existent.

THE application was disposed of on material filed with the Board.

The facts are fully set out in the judgment of the Chief Commissioner.

January 6, 1913. THE CHIEF COMMISSIONERS—This is an application made by the Federation of the Chambers of Commerce of the Province of Quebec asking that the South-Eastern Railway, between Drummondville and the city of Sorel, which is actually controlled by the Canadian Pacific Railway Company, and which has received subsidies from the Province of Quebec and the city of Sorel, be re-opened with the least possible delay.

In 1869, the Richelieu, Drummond and Arthabasca Railway Company was incorporated with powers to build from Drummondville to Sorel, a distance of thirty-five miles (32 Vic., Chap. 36, Que.).—The corporation of Sorel, in 1876, passed its by-law No. 89, subscribing for stock in the company to the extent of

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forty thousand dollars. In 1871 a subsidy was voted by the Provincial Legislature to aid the construction of the company's bridge over the Yamaska river, at Yamaska; and again, in 1872, a further aid was voted.

By an Act of the province passed in 1869, the South-Eastern Railway Company was also incorporated, with rights in largely the same territory as the Richelieu, Drummond, and Arthabasca Railway Company; and in 1874, by a further provincial Act, the two companies were amalgamated under the name of the South-Eastern Railway Company.

In 1875 further municipal bonuses were asked and some granted.

The railway was built and put in operation from Sorel to Sutton Junction, a distance of ninety-five miles, including in its length that portion now asked to be re-opened.

Mr. Lalonde, the Board's Assistant Chief Operating Officer who has investigated the matter, reports that the railway was kept in operation until about July, 1878, when it was taken over by the Canadian Pacific Railway Company and formed part of that system; and that four trains were operated daily over the section now in question, two running each way. He also reports that, at that time, traffic was of the greatest importance, and that the line was the principal feeder of the Montreal and Boston Air Line; and that, if the line were to-day opened for traffic, similar conditions would exist.

The railway was continued to be operated, apparently by the Canadian Pacific Railway Company, until the autumn of 1892, when the bridge over the Yamaska river was carried away by flood and ice. The company thereupon discontinued the service between Yamaska and Sorel, on the one side—a distance of ten miles—and between Yamaska and St. Guillame—a distance of fifteen miles—and the company, in December, 1893, abandoned that part of the line between St. Guillame and Drummondville, and closed it to the public; the result being that, since December, 1893, that portion of the line which it is now proposed to re-open, has been abandoned and closed.

Mr. Lalonde further reports that, on September 6th, 1899, the Canadian Pacific Railway Company sold the abandoned part of the line, between Sorel and Yamaska, to the South Shore Railway Company for twenty-five thousand dollars, and that that part of the line was rebuilt by the latter company, and is

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now operated by the Quebec, Montreal, and Southern Railway Company.

Nothing further has been done with the line from Yamaska to Drummondville, except that, in 1891, all the rails were lifted, and there is now no sign of a railway through that territory.

For the purpose of the disposition I propose to make of the case, I am going to assume that the railway company stopped the service and removed the railway in defiance of the express demands and interests of the neighbourhood, resulting in loss to the people of the district, not only in respect to bonuses given, but by lack of railway facilities that they were well entitled to. Under such circumstances, is there the slightest jurisdiction in the Board to make an order? In my view there is none.

The Railway Board was only constituted in the year 1903; the wrong now complained of happened ten years before. While, undoubtedly, to-day the Board would not allow any railway company to discontinue permanently operations simply because a bridge was carried away, it is impossible to say that there is the slightest jurisdiction in the Board to order that a service which ceased ten years before the Board's inception, and, under these circumstances, should be continued. The application is really not an application to re-open for service; it means the reconstruction, practically, of a line, part of which, further, is now operated by another system. It may be that, under the bonuses which some of the municipalities or the Provincial Legislature has granted, a redress may be had as a matter of contract; but if this is the case, the remedy is not to re-open this non-existent line, but in damages, which may be recovered in the appropriate court.

The application will, therefore, be dismissed.

THE ASSISTANT CHIEF COMMISSIONER, and COMMISSIONERS MILLS and MCLEAN concurred.

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SIMCOE FRUITS, LTD. AND ONTARIO FRUIT GROWERS' ASSOCIATION v. GRAND TRUNK AND CANADIAN PACIFIC RY. COS.

(File No. 19666.)

Board of Railway Commissioners. February 26, 1913.

1. CARRIERS (§ III A—378)—JURISDICTION—STOP-OVER PRIVILEGES—DISCRETION OF CARRIERS—STORAGE, INSPECTION OF COMPLETION OF CARLOAD—UNJUST DISCRIMINATION—RAILWAY ACT, SEC. 317.

It is entirely within the discretion of the carriers to grant or withhold stop-over privileges on carload and part carload shipments during its transportation to final destination at concentration points for the purpose of storage, inspection or completion of carload; therefore, where the stop-over privilege is not granted, unjust discrimination not having been established, the Board is without jurisdiction to direct that this privilege shall be given by the carrier.

2. CARRIERS (§ IV B—522*a*)—COMPLETION OF CARLOADS—STOP-OVER PRIVILEGES—RE-ESTABLISHMENT OF FORMER ARRANGEMENT—TOLLS IN AND OUT—THROUGH—JOINT ROUTE—RE-SHIPMENT.

For a number of years carriers carried a certain fruit commodity to concentration points for storage, inspection or completion of carload and reshipment at a reduction of one-third of the local tolls, the combination of these tolls in and out not to be less than the through toll from the first shipping point to final destination plus 2 cents per 100 lbs., and if to the concentration point a joint route had to be used, the reduction applied only to the portion of the earnings that the carrier received from the second haul or reshipment from that point, the railways not having satisfactorily justified withdrawing the completion of carload concession and restricting the storage and inspection privileges to carloads, an order should be made directing that the former arrangement should be re-established.

THE application was heard at Toronto 28th September, 1912.

R. A. Thomas, for the applicants.
C. A. Hayes, for the Grand Trunk Ry. Co.
W. M. Kirkpatrick, for the Canadian Pacific Ry. Co.

The facts are fully set out in the judgment of Mr. Commissioner McLean.

February 26, 1913. MR. COMMISSIONER MCLEAN:—Application is made for a stop-over for completion of carloads of fruit in transit, or, in the alternative, for the restoration of the special rate on part lots to concentration centres. Application is also made for reimbursement for slatting supplied for the floors of cars by shippers.

It is established by various decisions of this Board, as well as by decisions of the Intestate Commerce Commission, that the

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transit practice is a privilege, not a right. The following language expresses the position of the Board as set out in the judgment in connection with the application of the Board of Trade of Montreal for an order directing the C.P.R. Co., to furnish tariffs covering milling in transit arrangement on corn received at Montreal by rail from Georgian Bay elevator ports and from Detroit, etc., File 12384:—

"We cannot require a railway company to establish a milling in transit rate on anything; it is optional with them to do it. If they choose to do it themselves, then they may get under our jurisdiction if it discriminates against anybody. But in the absence of any milling in transit rate on corn for local consumption, I do not see how it can get under our control at all. We cannot require them to put in such a rate as I understand it. If they do it and then if discrimination follows, it would come under the discrimination clause."

The same position applies here. Discrimination not having been established, the Board is without power to direct that this privilege shall be given by the railway.

In the matter of the application for the restoration of the special rate in part lots to concentration centres, the situation as disclosed by the Board's records appears to be as follows: From December 10th, 1904, when tariffs were first filed under the Act (and probably much earlier), down to March 28th, 1911, both the Grand Trunk and Canadian Pacific carried apples to concentration points for storage, inspection, or *completion of carload* and reshipment, at a reduction of one-third from the local tariff rates. The combination of the in and out rates was not to be less than the through rate from the first shipping point to the final destination, plus 2 cents per 100 lbs., and if to the concentration point a joint route had to be used, the reduction applies only to that portion of the earnings of the company that received the second haul, or reshipment, from that point. On March 29th 1911, the arrangement was modified by withdrawing the completion-of-carload concession, and restricting the storage and inspection privileges to carloads.

The railways have not satisfactorily justified the abrogation of the arrangement which has been shewn to have been in existence in Ontario for a number of years; and an order of the Board should go directing the re-establishment of the hitherto existing arrangement,—this to be effective within thirty days.

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The second phase of the application is concerned with the determination of the allowance to shippers for slatting furnished by them for the floors of refrigerator cars. From the evidence, the allowance is desired in connection with soft fruits, e.g., peaches and plums. It will be sufficient at present to require the Grand Trunk, the Grand Trunk Pacific, the Canadian Pacific, and the Canadian Northern to notify the Board not later than April 15th what number of their refrigerator cars in service are supplied with slatted floors, and what number are not. When this information is received, the Board will then be in a position to determine what allowance should be made to shippers furnishing slatting for the floors of cars.

THE CHIEF COMMISSIONER concurred.

TOLLS.

IN RE CARTAGE TOLLS.

(File No. 18663.9.)

Board of Railway Commissioners. December 17, 1912.

TOLLS FOR CARTAGE — INCREASE — JURISDICTION — RAILWAY ACT, SEC. 2(30).

Although cartage companies *per se* are not under the jurisdiction of the Board, the charge made for cartage by railway companies is a toll under sec. 2 (30) of the Act, and must be approved by the Board.

The tariff of tolls filed by the railway companies increasing the tolls for cartage to the shipping public from two cents a hundred and fifteen cents for smalls to three cents and twenty cents, respectively, was amended by the Board to two and a half cents a hundred, and the present toll on smalls continued.

The increase was approved on account of the advance in the cost of horses, wages and feed during the last few years.

THE application was heard at Ottawa, December 17, 1912.

J. McNaught, for the C.P.R. Co.
G. H. Shaw, for the C.N.O. R. Co.
W. L. Scott, for the O. & N.Y.C. R. Co.
G. F. Henderson, K.C., for Hendrie & Co., Ltd.
H. C. Beckett, for the Hamilton Board of Trade.
J. R. Walsh, for the Canadian Manufacturers' Association.
W. S. Tilston, for Montreal Board of Trade.
C. A. Hayes, for the Grand Trunk Ry. Co.

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The facts are fully set out in the oral judgment of the Assistant Chief Commissioner, delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER:—The railway companies have, for many years, been carrying on a cartage business, through these cartage companies. Under the Railway Act, as it is now in force, the charge for cartage is a toll, and the railways must submit to the Board the toll they charge for cartage.

The railway companies have been collecting for many years two cents a hundred and fifteen cents for smalls, and they have submitted to the Board, a tariff in which they desire to charge three cents a hundred and twenty cents for smalls. Had it not been for the intervention of the Board, that tariff would have come into effect—at least so far as the Grand Trunk and Canadian Pacific Railway Companies are concerned—some time ago—I think it was the 11th of November—but we issued an order postponing the effective date of that tariff until the matter could be looked into and considered. The matter was before the Board at the November operating sittings a month ago. Since then, conferences have been held between the parties interested, and we have to-day heard from those representing the parties who conferred—except some of the cartage companies—the result of their interviews.

The cartage companies *per se*, of course, are not under our jurisdiction, and they have the right to absent themselves, as two of them have done to-day, from this meeting, if they so desire. It might have been beneficial to have had the assistance of their advice. The Hendrie Company were polite enough to come forward, and they have given us substantial assistance in telling us what their views are in the matter. However, the other companies are within their rights in doing what they have done.

I think we are all agreed that it is a benefit to both the railway companies and the shipping public to have these cartage companies carry on this cartage business as they do. The shipping public, of course, are free to use their own concerns, or to hire the conveyances of private cartage companies, if they so desire, but this is not done except in a few cases. The general use of the cartage companies by the shipping public is evidence—of course there is a lot of other evidence besides—that it is a convenient method to have the cartage done.

That being so, and the rates charged for cartage by the rail-

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way companies being under our jurisdiction, it is incumbent upon us to decide whether the railway companies' tariffs which have been filed should be permitted to go into effect, that is, tariffs containing these higher rates.

From the investigation we have made, and from the evidence submitted, it is clear to us that it is not unfair to permit some increase in the cartage rates. The cost of horses, the cost of labour, the cost of feed have all gone up within the last few years, commensurate, I suppose, with the cost of everything we use. We all know the cost of living has tremendously increased.

The railway companies ask for three cents a hundred. We think they are asking too much. We think that rate should not be granted. But we are of the opinion that they might be permitted to charge two and a half cents a hundred, and that the present rate on smalls might continue at 15 cents.

The evidence in regard to the Canadian Pacific Railway Company is that they are collecting more on the handling of smalls than they are paying their cartage company for that particular item of business. Of course, the Canadian Pacific Railway Company, as well as the Grand Trunk and other companies, are paying the cartage companies much larger sums than they are collecting from the public. They are free to make their own bargains with those cartage companies; we have nothing to say as to that. But bearing in mind the general benefit to the public, and the increased cost of living which we all realize, and the evidence given to us of the increased cost in the items which make up the expenditure of the cartage companies, we feel that 2½ cents a hundred should be allowed.

Therefore, if amended tariffs on those lines are filed to become effective on the 1st of January—that was the date to which we had put off the effective date of the tariffs heretofore filed—they may then come into effect.

It has just been pointed out that there should be thirty days' notice. Therefore, it may be the 1st of January is too early a date. Mr. Hardwell will look into that, and, of course, the public will get notice when the effective date should be.

Mr. Hayes:—I think the tariff is simply under suspension at the present time with both the Interstate Commerce Commission and this Board.

THE ASSISTANT CHIEF COMMISSIONER:—You have got to give the Interstate Commerce Commission thirty days.

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Mr. Hayes:—For a reduction. It will be a reduction of the present tariff.

Mr. Hardwell:—The present tariff is postponed to and including the 31st day of December.

Mr. Hayes:—The new tariff will be a reduction.

Mr. Hardwell:—No. This tariff was postponed. It will be an advance over the existing tariff.

Mr. Kirkpatrick:—There is no trouble in getting permission from the Interstate Commerce Commission if your order reads the 1st of January.

THE ASSISTANT CHIEF COMMISSIONER:—You had better give the public the benefit of the doubt. We will make it thirty days from now.

IMPERIAL RICE MILLING CO. v. CANADIAN PACIFIC RY. CO.

(File No. 20198.)

Board of Railway Commissioners. November 29, 1912.

1. EVIDENCE (§ I E—53*a*)—JUDICIAL NOTICE — TOLLS — CANADA AND A FOREIGN COUNTRY—COMPARISON.

   The Board not having any jurisdiction over the tolls charged in a foreign country, no comparison can be made between them and those in Canada for the transportation of the same commodity.

2. CARRIERS (§ IV C 4—542)—TOLLS—ALL RAIL AND LAKE AND RAIL—ROUTES—COMPETITION—UNJUST DISCRIMINATION—EAST AND WESTBOUND.

   The tolls for the lake and rail route being on a competitive basis and the all-rail route eastbound having the advantage of one cent over the rail portion of the route westbound to Winnipeg there was no unjust discrimination.

3. CARRIERS (§ IV C 4—542)—TOLLS—REDUCTION—COST OF PRODUCTION—EQUALIZATION.

   The Board is concerned with seeing that tolls are on a relatively equal basis. It is not its function to equalize costs of production and upon the evidence a case for reduction in tolls was not made out. [*Canadian Portland Cement Co.* v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211, followed.]

APPLICATION to direct the respondent to reduce its tolls from Vancouver to Winnipeg, alleging unjust discrimination in favour of its competitors, shipping from Montreal to the same point.

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The application was heard at Vancouver, November 29, 1912.

A. E. Mason, for the Applicant.
A. H. Macneill, K.C., for the Respondent.

The facts are fully set out in the judgment of Mr. Commissioner McLean, delivered at the close of the hearing.

MR. COMMISSIONER MCLEAN:—The situation seems to be one in which we have to deal with rates within Canada. Foreign rates have been referred to, but we have not been informed exactly what they are. Even if the rates from New Orleans were on a lower basis, these would be rates in the United States, over which this Board has no control. The application seems to narrow itself down to the question of the rates from Vancouver to Winnipeg versus the rates from Montreal to Winnipeg.

Now, so far as the rate basis is concerned, you have between Montreal and Winnipeg the lake and rail rate of sixty-five cents. That is a competitive basis. So far as the rail comparison is concerned, it is shewn that Vancouver has an advantage of one cent over Montreal, so that there does not seem to be any rate discrimination.

As to the question of lower cost, and its bearing on the rate adjustment, it is stated that rice brought in from Rangoon, via Montreal to Winnipeg, is a lower priced article than rice brought in from Japan, and that the latter is, therefore, at a disadvantage in point of trade competition. That is a question of the cost of the material. The Board has ruled in other cases that what it is concerned with is seeing that the rates are on a relatively equal basis; it is not its function to equalize costs of production.

It appears to me, on the material submitted, a case for rate revision has not been made out.

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STATIONS.

TOWN OF FORWARD v. CANADIAN PACIFIC RY. CO.

(File No. 6713.28.)

(Forward Townsite Case.)

Board of Railway Commissioners. July 22, 1912.

1. CARRIERS (§ IV D—550)—STATIONS—LOCATION.

The Board refused an application for an order directing a railway company to establish a station at the crossing of another railway about two miles distant from its existing station where a townsite had been located, elevators erected and a municipality organized, the usual distance between stations being eight or ten miles.

[*Eby et al.* v. *Grand Trunk Pacific Ry. Co.*, 13 Can. Ry. Cas. 22, followed.]

APPLICATION to direct the respondent either to remove to, or locate another station at a point, within two miles, where the Canadian Northern crosses the respondent's line of railway.

The application was heard at Regina, July 22, 1912.

C. E. D. Woods, for the Applicant.
W. H. Curle, for the Respondent.

The facts are fully set out in the judgment of the Assistant Chief Commissioner delivered at the close of the hearing.

THE ASSISTANT CHIEF COMMISSIONER:—In this matter the Canadian Pacific Railway Company established a station at the town of Forward some time ago and spent a considerable sum of money. Three elevators were erected there and other buildings, and a municipality organized under the laws of the province. Subsequently it appeared to the people of that village that the Canadian Northern was going to cross the Canadian Pacific some distance west, and they feared that the establishment of townsites on the Canadian Northern might be injurious to their business; also they discovered that the water at Forward was not as good as could be got elsewhere. For this and perhaps other reasons they desired to move the station of Forward to the place where the Canadian Northern would cross the Canadian Pacific track, a distance away of one mile and eight-tenths, we are told.

Negotiations were carried on between the people and the Canadian Pacific Railway Company to get the station moved,

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and while the district agent, Mr. Duval, in one telegram gave them some encouragement, still, at a later date, in an interview with Mr. Whyte, the vice-president, and in a letter from him, they were not encouraged in the undertaking, and the Canadian Pacific Railway Company gave no promise and are under no obligation to carry out anything. They said nothing which would lead these people to believe the station would be moved.

The applicants now say: "We are not before you asking for the removal of the station; we are before you asking for the establishment of a station at this point of junction with the C. N. R. We do not care if they continue their existing station, telegraph operator, and so on, at that town. Our application is for a station and agent at this new location, which is shown on this map at West Forward; that is, at the point where the Canadian Northern crosses."

Dealing with it in that way, we find that the Canadian Pacific Railway Company has a station and agent and suitable facilities within two miles of this point, and it is not the policy of the Board to establish facilities as close as two miles. Usually it is about 8 or 10 miles apart where facilities of that kind are established. See *Eby et al.* v. *Grand Trunk Pacific Ry. Co.*, 13 Can. Ry. Cas. 22.

We do not see that the Canadian Pacific Railway is under any obligation at all to move, and as it has a station at Forward and has these facilities within two miles of the new location, we do not see that we should order them to go to the expense of erecting a station at the point applied for. It may be in their own interests it would be wise for them to move, but they are here opposing it, and opposing it very strongly, and, under these circumstances, we do not see that we can grant this application.

I might say that an additional reason for refusing it is that the Canadian Pacific Railway Company has a townsite at Forward, where they have spent their money, where they have some vested interests, and it would be indeed hard for us to order them to leave their own investment and go elsewhere and in that way suffer financial loss.

The parties have been in negotiation with the Canadian Northern, and have received encouragement from that Company. The Canadian Northern has not yet located its station on that line, but it is to-day stopping its trains and taking on and setting off traffic at that point, and, therefore, it is more than

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likely that the Canadian Northern will establish a station at West Forward. In fact there would be strong ground for the Board interfering if the Canadian Northern did not establish a station there, if the evidence of these interviews with Mr. McKenzie and Mr. McLeod is correct. Of course, we have not heard the Canadian Northern on that point, and it is in no way bound by anything said here to-day.

Under these circumstances, the application is refused.

CONSTRUCTION OF STATUTES.

TORONTO & NIAGARA POWER CO. v. TOWN OF NORTH TORONTO. (25 O.L.R. 475.)

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. February 1, 1912.

1. STATUTES (§ III—132)—SPECIAL ACT REFERRING TO PRIOR GENERAL ACT —AMENDMENT—CONSTRUCTION.

Where a general clause of another statute is by the incorporating Act made applicable to a corporation, and its undertakings by a reference which does not specify an amendment already made to such general clause, such amendment is to be read as forming part of the company's Act of incorporation and will control the powers granted to the company.

[The Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (*b*) construed.]

2. STATUTES (§ I G 2—86)—SPECIAL LEGISLATION—PUBLIC SERVICE CORPORATION—USER OF HIGHWAY—CONTROL BY GENERAL STATUTE.

A clause in a general Act making it a condition precedent to the erection of electric light poles and wires, in a municipality, that the consent of the municipal council shall be first obtained and that the whole work incident to the erection of the poles shall be under the supervision of an appointee of the council, is not inconsistent with nor superseded by special provisions contained in the Act of incorporation of an electric light company conferring upon it the power to erect poles in a street, and to operate the business of the company and making the company responsible for damages caused in carrying on or maintaining their works.

3. HIGHWAYS (§ II B—47)—ELECTRIC LIGHT COMPANY—RIGHT TO ERECT POLES ON STREET.

Powers conferred by a special Act of Parliament incorporating an electric light and power company whose powers include the erection of poles and the doing of all things necessary for the transmission of light, heat, and power, provided that the same is done so as not to "incommode" the public use of streets are not in conflict with the provisions of an amended section of a general Act, which is made applicable to the corporation by its Act of incorporation, and which makes it a condition precedent to the erection of poles that the consent of the municipal council shall be first obtained.

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APPEAL by the defendants from the judgment of Boyd, C., 24 O.L.R. 537, deciding that the plaintiffs had, under the powers given them by their Act of incorporation, the right to go upon the highway of defendants for the purposes of their undertaking without the permission of the municipal corporation having control of such highway.

The appeal was allowed.

Messrs. *G. H. Watson,* K.C., and *T. A. Gibson,* for the defendants. The Act of incorporation of the plaintiffs, being ch. 107 of 2 Edw. VII. (D.), does not empower the plaintiffs to enter upon any public highway, and thereupon construct, erect, and maintain their poles and transmission lines on or across such highway. The Act does not give power to the plaintiffs, without the leave or license of the defendants, to take possession of a street or highway for the purposes of their business. There is an absence of authority or right on the part of the plaintiffs to do the things mentioned, without the express consent of the municipal council, and the direction and approval of such person as it appoints, and under its direction. These conditions are not inconsistent with the plaintiffs' incorporating Act. We refer to the following Dominion statutes in support of these contentions: 51 Vict. ch. 29, sec. 123, repealed by sec. 6 of 63 & 64 Vict. ch. 23, and a new section substituted therefor; 51 Vict. ch. 29, sec. 90, amended by 62 & 63 Vict. ch. 37, sec. 1; 2 Edw. VII. ch. 107, sec. 21.

D. L. McCarthy, K.C., for the plaintiffs. The only point in issue between the parties at the present time is, whether the plaintiffs require the leave or license of the defendants before proceeding with their proposed work. On this point the plaintiffs contend that the wording of secs. 12 and 13 of their incorporating Act, 2 Edw. VII. ch. 107, give them the right to do the work contemplated, without the leave or license of the defendants: *Toronto Corporation* v. *Bell Telephone Co. of Canada,* [1905] A.C. 52. The amendment made to sec. 90 of the Railway Act of 1888 was repealed in 1903 with the rest of the Act.

Watson, in reply.

February 1, 1912. Moss, C.J.O.:—Appeal by the defendants from a judgment of the Chancellor of Ontario after trial without a jury.

The plaintiffs, an incorporated company, with power to pro-

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duce, sell, and distribute electric and other power and energy, and for those purposes to construct, maintain, and operate lines of wire, poles, tunnels, conduits, and other works, and to erect poles, construct trenches and conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances require, brought this action against the Municipal Corporation of North Toronto for an injunction to restrain that body from interfering with or preventing the plaintiffs in the erection of poles and lines of wire in and along Eglington avenue, a highway within the corporation limits, or in the alternative—by amendment asked for at the trial—for a declaration that they were entitled to erect their poles and wire for the transmission of electricity upon and along the public streets of the municipality, without the leave or license of the defendants.

The learned Chancellor awarded the plaintiffs the latter relief, subject to certain conditions as to depositing plans and books of reference, and obtaining the approval of the engineer of the Dominion Board of Railway Commissioners thereto.

The plaintiffs were incorporated by Act of the Dominion Parliament, 2 Edw. VII. ch. 107, which was assented to on the 15th May, 1902. Section 21 of the Act declares that sec. 90—together with certain other sections—of the Railway Act, shall apply to the plaintiffs and their undertakings, in so far as the said sections are not inconsistent with the special Act.

The Railway Act in force at that time was the Act 51 Vict. ch. 29, which was assented to on the 22nd May, 1888. But, between that date and the date of the Act incorporating the plaintiffs, a number of amendments to the earlier Act had been made, and, among others, sec. 90 was amended by adding thereto a new sub-section.

This enactment is contained in the first section of the Act 62 & 63 Vict. ch. 37, which was assented to on the 11th August, 1899. When, therefore, in 1902, sec. 90 of the Railway Act was incorporated into the plaintiffs' incorporating Act, the sub-section added by 62 & 63 Vict. ch. 37 formed part of the enactments which were made to apply to the plaintiffs and their undertakings, in so far as they were not inconsistent with the incorporating Act.

At the trial, the existence of this sub-section appears to have been overlooked, and the learned Chancellor's attention was not directed to it. We are, therefore, without the benefit of his view as to its bearing upon the rights asserted by the plaintiffs.

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Its language appears to render it applicable in many respects to the case in hand. To begin with, it specifies and deals with the case of companies empowered by Parliament to construct and maintain lines for the conveyance of light, heat, power, or electricity, that is to say, some of the very objects for which the plaintiffs were incorporated. And, with regard to that subject, it enacts that "when any company has power by any Act of the Parliament of Canada to construct and maintain lines . . . for the conveyance of light, heat, power or electricity, such company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and, as often as the company thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions." One of these provisions (*f.*) is as follows:—

> The opening up of any street, square, or other public place for the erection of poles, or for carrying wires under ground, shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the said council directs; the council may also designate the places where such poles shall be erected; and such street, square, or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition, by and at the expense of the company.

These provisions were carried into the Railway Act, 1903, and are now to be found, in a somewhat modified form, in sec. 247 of the Railway Act, R.S.C. 1906, ch. 37.

If these enactments, in so far as they require that a company with the powers possessed by the plaintiffs must proceed with the consent of the municipal council, and subject to the direction and approval of such person as it appoints and under its direction, are not inconsistent with the plaintiffs' incorporating Act, they are applicable to the plaintiffs and their undertaking; and, if so, the plaintiffs are left without support for the present action.

The plaintiffs rest the right asserted in the action upon secs. 12 and 13 of the incorporating Act.

Is there anything in them reasonably inconsistent with sec. 90 of the Railway Act, as it stood when it was imported into the plaintiffs' Act?

In other words, can it be fairly said that, having regard to the objects for which the plaintiffs were incorporated, the char-

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acter of the work necessary to be done in order to carry these objects into effect, and the public ownership and user of much of the property upon, along, and over which the plaintiffs' powers were to be exercised, there is any substantial contradiction between the provisions of secs. 12 and 13 of the incorporating Act and sec. 90 of the Railway Act?

Sections 12 and 13 confer powers that are requisite and necessary as of course, in order to enable the plaintiffs to prosecute the enterprise for which they were incorporated.

They are empowered by sec. 12 to acquire, construct, maintain, and operate works for production, and works for the conduct and supply, of electricity and other power, and by means thereof produce and transmit and furnish it to, or receive it from, others, as well as to perform other acts. And sec. 13 says that they may erect poles, construct trenches or conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways, or public places, or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but they shall be responsible for all damage which they cause in carrying out or maintaining any of these works.

These provisions do not expressly negative the property rights of municipalities or individuals; and the stipulation as to payment of damages found in each of these two sections does not necessarily exhaust the conditions to which the plaintiffs could reasonably be required to conform.

The enactments of the sub-section added to sec. 90 of the Railway Act are not in conflict with what is enacted in secs. 12 and 13 of the incorporating Act. They follow naturally as directions incident to the exercise of the powers given to the plaintiffs in order to the carrying out of their enterprise. Even before the date of the plaintiffs' Act, the trend of legislation had set in the direction of municipal control over the exercise of powers upon streets and highways by incorporated companies; and that circumstance may account for the importation of sec. 90 into the incorporating Act. In any case, the question is one of construction of the Act as a whole; and the provisions are to be read together, if they may be so read without leading to an unreasonable or absurd result.

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Reading them together, the meaning to be gathered seems to be, that secs. 12 and 13 confer powers to be exercised in conformity with the directions of sec. 90 of the Railway Act, in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power, and electricity upon or along highways, squares, or other public places.

That being the case, the plaintiffs' case fails, and the action should have been dismissed.

It follows that the appeal must be allowed and the action dismissed; but, under all the circumstances, there should be no costs to either party.

GARROW, J.A.:—I agree.

MACLAREN, J.A.:—The plaintiffs, professing to act under the powers conferred upon them by the Dominion statute of 1902 incorporating them, being 2 Edw. VII. ch. 107, were proceeding with the erection of poles for the purpose of stringing electric transmission wires along Eglington avenue, in the town of North Toronto. They were stopped by the municipal authorities and their workmen arrested. They assert that the town authorities have nothing to say in the matter and no right to interfere with them, and bring the present action for an injunction restraining the town corporation from interfering, and for a declaration that they have the right to erect their poles and string their wires on the streets of the town, without asking leave so to do.

The works authorized by the company's Act of incorporation are declared to be for the general advantage of Canada.

By sec. 12:—

> The company may acquire, construct, maintain and operate works for the production, sale and distribution of electricity and power, for any purpose for which such electricity or power can be used, and may construct, maintain and operate lines of wire, poles, tunnels, conduits and other works in the manner and to the extent required for the corporate purposes of the company, and may conduct, store, sell and supply electricity and other power, and may with such lines of wire, poles, conduits, motors or other conductors or devices, conduct, convey, furnish or receive such electricity to or from any person, at any place, through, over, along or across any public highway, bridges, viaducts, railways, watercourses, etc.
>
> 13. The company may erect poles, construct trenches or conduits and do all other things necessary for the transmission of power, heat or light as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of

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streets, highways or public places or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but the company shall be responsible for all damage which it causes in carrying out or maintaining any of its said works.

The case was tried by the Chancellor, who held that under the sections of their charter above quoted and the authority of *Toronto Corporation* v. *Bell Telephone Co.*, [1905] A.C. 52, the company had the right to erect their poles and string their wires along Eglington avenue, without asking the leave of the town; but held that, before doing so, they should deposit a plan and book of reference as required by the Railway Act; and, inasmuch as the evidence shewed danger to the other wires on the streets of the town, the company should obtain the approval of their plan by the engineer of the Dominion Railway Board. We were informed by counsel for the company that they had deposited their plan and would obtain the consent of the Railway Board engineer, although they did not admit that the Board had any jurisdiction in the matter.

In my opinion, the company misconceived their rights, and I consider that the question at issue is governed by sec. 247 of the Dominion Railway Act, R.S.C. 1906, ch. 37, which does not appear to have been cited to the learned Chancellor. This section provides that "when any company is empowerd by special Act of the Parliament of Canada to construct, operate and maintain lines . . . for the conveyance of light, heat, power or electricity, the company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said powers . . . subject, however, to the following provisions: . . . (*e*) The opening up of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such person as the municipal council may appoint," etc. Sub-section 5 provides that, if the company cannot obtain such consent, it may apply to the Railway Board, to which it shall submit a plan of the highway, square, or other public place, shewing the proposed location of such lines, wires, and poles. By sub-sec. 6, the Board may grant the application in whole or in part, and may make such changes or impose such terms as it deems expedient.

Section 21 of the company's charter provides that sec. 90 and some other sections of the Railway Act of 1888 shall apply

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to the company and their undertakings, except in so far as the said sections are inconsistent with the provisions of the charter. This would include the amendment to sec. 90 passed in 1899, 62 & 63 Vict. ch. 37, which provided that when any company was given power to construct and maintain lines for the conveyance of light, heat, power or electricity, the company might, with the consent of the municipal authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said power.

This amendment was referred to and relied upon by the defendants' counsel before us, and he informed us that it had not been cited to the learned Chancellor. The plaintiffs' counsel's reply to this argument was, that this amendment to sec. 90 was repealed in 1903, with the rest of the Railway Act of 1888, and was no longer law.

If the defendants had to rely upon this section, it would be necessary to inquire what effect the repeal of 1903 had, and whether the provisions of the amendment of 1899 were inconsistent with the powers conferred on the plaintiffs by their charter, and particularly by secs. 12 and 13, specially relied upon by their counsel.

But, in my opinion, it is not necessary for us to look at or rely upon the amendment of 1899. The Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (*b*), provides that "whenever any Act or amendment is repealed, and other provisions are substituted by way of amendment, revision or consolidation . . . any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment."

This precisely meets the present case. When the Railway Act of 1888 was repealed on its revision and consolidation in 1903, the second part of sec. 90 of the Act of 1888 was amended, and became sec. 195 of the Railway Act, 1903; and on the general revision of the statutes in 1906, this sec. 195 became sec. 247 of the Railway Act, R.S.C. ch. 37, quoted above; so that the company's charter of 1902 must now be read as if this sec. 247 had originally been embodied in and had formed a part of the company's Act of incorporation.

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A reference to sec. 247 shews that it applies to any company empowered by special Act of Parliament to construct, operate, and maintain lines for the conveyance of light, heat, power, or electricity, and is not limited, like the amendment of 1899, to companies incorporated after a day named.

The company had, therefore, in my opinion, no right to proceed to erect their poles on Eglington avenue, as they claimed they had the right to do, without the consent of the Municipal Council of North Toronto, and are subject to the supervision of such person as the said council may appoint; and, if the council refuse such consent, the company should apply to the Railway Board, submitting a plan of the streets, squares, or other public places on which they wish to exercise their powers, and the proposed location of such lines, wires, and poles.

The appeal should be allowed, and the plaintiffs' action dismissed, but without costs.

MEREDITH, J.A.:—Under the plaintiffs' Act of incorporation, 2 Edw. VII. ch. 107—assented to on the 15th May, 1902—sec. 90 of the Railway Act—with other sections of that enactment—was made applicable to the plaintiffs and to their undertaking, in so far as it was not inconsistent with the provisions of the Act of incorporation; and that section of the Railway Act, as it was when the plaintiffs were incorporated—62 & 63 Vict. ch. 37, sec. 1, assented to on the 11th August, 1899—and as it still is, required, and requires, the consent of the municipal council, or other authority, having jurisdiction over the highway, before such work as that in question could or can be done lawfully, as well as that the opening up of the highway should be subject to the direction and approval of such person as the municipal council should appoint, and should be done in such manner as such council should direct; which council might also "designate" where the poles should be erected.

These things are not inconsistent with the provisions of the Act of incorporation; and were quite in accord with the trend of legislation at that time, in that respect; a trend which, to say the least of it, has not since weakened.

The power of the plaintiffs in respect of the matters here in question, conferred by the Act of incorporation, apart from that part of the Railway Act engrafted upon it, are by no means as plainly expressed as they might be, but the Act certainly does not, in so many words, provide for the carrying of the plaintiffs'

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wires along the highway, as they please, against the will of the municipality; and, reading sec. 90, of the Railway Act, into the Act of incorporation, as if it had there been set out in full, one can have no reasonable doubt that the right and power of the municipality, set out in it, were intended to be applicable to the plaintiffs' undertaking; and, that being so, this appeal must be allowed, and the action dismissed, because the acts of the plaintiffs, complained of in this action, were done in disregard of such right and power; but, as, for some unaccountable reason, the provisions of sec. 90 of the Railway Act, as they were at the time of the passing of the Act of incorporation, and since have been, were not brought to the attention of the Court below, I would make no order as to costs either here or there.

MAGEE, J.A.:—The powers of conducting its lines and erecting poles along the streets of a municipality given in 1902 to the plaintiff company by their special Act of incorporation, 2 Edw. VII. ch. 107, in secs. 12 and 13, were practically the same as those conferred upon electric telegraph companies by the general Act relating to them, R.S.C. 1886, ch. 132, and upon various telephone companies.

In 1899, it had become frequent that railway companies would apply for and be granted in their special Acts of incorporation power to generate and dispose of electricity for light, heat, and power, and to construct telegraph and telephone lines for public messages. In the session of 1899 alone, such powers were given to various railway companies—see, among others, 62 & 63 Vict. chs. 50, 66, 70, 72, 77, 85, and 87. There were no sections of the general Railway Act specially applying to these powers, and in some of the special Acts the particular company was given the powers of the Electric Telegraph Companies Act —*e.g.*, in 62 & 63 Vict. chs. 50 and 70.

So, in 1899, sec. 90 of the general Railway Act of 1888 was amended by 62 & 63 Vict. ch. 37, sec. 1, by adding a sub-section, 2, which, however, was not to apply to companies incorporated before that year. That new sub-sec. 2 declared:—

> When any company has power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or lines for the conveyance of light, heat and power or electricity, such company may with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and, as often as the company

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thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions.

The provisions (*a*) to (*k*) which follow are all restrictions upon the company, and one of them (*f*) declares that "the opening up of any street . . . for the erection of poles . . . shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the council directs; the council may also designate the places where such poles shall be erected."

That this amendment of sec. 90 was intended to embody the general policy to be adopted for the future with regard to all such railway companies, can, I think, hardly be doubted, expressly limited as it was to companies incorporated in that session or thereafter. And it could hardly be argued with success that those companies which in that session had inserted in their special Acts a reference to the Electric Telegraph Companies Act could thereby override the new amendment and dispense with the consent of the municipal council.

I have said that it was the policy for all such railway companies, for I think it was limited to them. Although it refers to "any company," it was only an amendment of a section in the Railway Act of 1888, and in that Act "company" means "railway company." This is the more obvious when we turn to the Railway Act of 1903, which consolidated the various statutes as to railways. There, in the corresponding section, 195, the words are, "the company," which again means "railway company." In the present Railway Act, R.S.C. 1906, ch. 37, sec. 247, the expression "any company" is again used, but the definition of "company" is the same; and in the following section, 248, special reference is made to other telephone companies and requiring municipal consent.

Then this company was incorporated in 1902, for equally dangerous if equally useful purposes, and Parliament declared that sec. 90 of the Railway Act and sixty-two other sections of that Act should apply to it, so far as not inconsistent with the special Act. As sec. 90 was only one of sixty-three sections thus incorporated with the latter Act, there cannot be said to be any implication that Parliament considered that particular section to be inconsistent with it. Section 90 was the one of the sixty-three sections which specially related to the powers of a company as to the construction of its line—and the sub-section added in 1899 was specially applicable to such works as those

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of this company. As the company was not a railway company, it was necessary in the special Act to declare that, for its purposes, in those sixty-three sections of the Railway Act, the word "company" should be deemed to mean this company.

Considering the objects of the company, there was certainly no reason why they should, in relation to highways, be given greater powers than railway companies with similar subsidiary objects. There was every reason why they should not. They stand practically in the same position as regards legislation as the companies I have referred to, which were given the powers of the Electric Railway Act. Can it then be said to be inconsistent with their power to construct their lines along the highways, that they should comply with sec. 90 and obtain the consent of the municipality? Section 12 of their special Act gives power to enter upon and take private property; but it could hardly be considered that it would be inconsistent with that to require them to take the proper regular proceedings under the provisions of the Railway Act made applicable.

So when they are given power to put up their lines and poles upon the highway, there seems no reason to consider that they should do so otherwise than as prescribed by the very section (90) which is made applicable to them, and which requires the municipality's consent and approval and directions; and I do not see any inconsistency in the two enactments, although one qualifies the other, especially as the special Act itself, in sec. 13, shews that the public use of the streets and the private access to property was not to be incommoded. The necessity for approval of the authority which is the statutory guardian of such streets, and responsible for their repair, is quite consistent with the right to put the poles and wires along them.

It is noticeable that in this singular special Act, which places no restriction on the locality of the company's operations in Canada, and indicates locality only in its title, the objects of the company are nowhere stated, but only as its powers are in various sections declared. There is every reason to construe these sections, then, to be as much statements of the objects of the company, as specifications of the way in which those objects are to be carried out; and, therefore, still less "inconsistency" in holding the general policy of sec. 90 to be applicable.

In am, therefore, of opinion that the consent of the municipality was necessary under the amendment of 1899, which was

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not brought to the attention of the learned Chancellor. This necessity has not been dispensed with by subsequent legislation.

In 1903, the Railway Act was recast and consolidated in 3 Edw. VII. ch. 58, which came into force by Royal Proclamation. It repealed the Act of 1888 and the amending Act of 1899, but it does not seem to have changed the situation. In sec. 195, it re-enacted the provisions of the 1899 amendment to sec. 90, and this time without restricting it to companies incorporated in or after 1899, thus emphasizing the general policy; but, in sec. 5, it declared that, unless otherwise expressly declared, "where the provisions of this Act and of any special Act . . . relate to the same subject-matter, the provisions of the special Act shall be taken to override the provisions of this Act, in so far as is necessary to give effect to such special Act;" and that if in any special Act passed theretofore the application of any provision of the Railway Act was excepted, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited, or qualified in like manner. It may be questioned whether that section, 5, relates to any companies other than such as the Act has in view, that is, "railway" companies and whether it would apply to companies for a different purpose, as to which Parliament had, for the sake of brevity, referred to the Railway Act. But, whether that be so or not, it is evident that the powers of this company were not curtailed thereby.

The same may be said of the revised Act of 1906, R.S.C. 1906, ch. 37, secs. 247, 3, and 4.

In all these Railway Acts of 1888, 1899, 1903, and 1906, the word "company" refers, as I have said, to a railway company (sec. 248 expressly refers to a telephone company). It is only by virtue of this company's special Act, sec. 21, that the word "company" in the specified sections can be taken to mean this company.

Then what was the effect of the repeal in 1903 of the Acts of 1888 and 1899? The Interpretation Act then in force, R.S.C. 1886, ch. 1, sec. 7, in clause 51, enacted that, whenever any Act is repealed and other provisions are substituted by way of amendment, revision, or consolidation, any reference in any unrepealed Act to such repealed Act or enactment shall, as regards any subsequent transaction, matter, or thing, be held and construed to be a reference to the provisions of the substituted Act relating

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to the same subject-matter. The same provision is to be found in the present Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (*b*). Thus, this company's special Act is to be read with sec. 247 of the present Railway Act, R.S.C. 1906, ch. 37, which governs, and is not, in my opinion, inconsistent with it.

I would, therefore, agree in allowing the appeal.

Appeal allowed.

See next case.

TORONTO & NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

([1913] A.C. 834.)

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Macnaghten, Lord Dunedin, Lord Atkinson, and Sir Charles Fitzpatrick. July 24, 1912.

1. STATUTES (§ 3 II A—98)—CONSTRUCTION—GIVING EFFECT TO WHOLE STATUTE—SPECULATION AS TO LEGISLATIVE INTENT.

In deciding a question of statutory construction, a Court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes taken as a whole.

2. STATUTES (§ II A—96)—LEGISLATIVE INTENT—RAILWAY ACT, R.S.C. 1906, CH. 37.

The language of the Railway Act, R.S.C. 1906, ch. 37, expresses an intention to preserve intact all powers conferred by previous special Acts of incorporation upon companies within its scope, except where otherwise specifically mentioned.

3. STATUTES (§ II A—96)—INTENTION OF PARLIAMENT—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 248.

Section 248 of the Railway Act, R.S.C. 1906, ch. 37, shews that, where Parliament intended by that Act to interfere with the powers of companies other than railway companies, it has done so by special provision.

4. HIGHWAYS (§ II B—47)—SPECIAL ACT CONFERRING POWERS ON ELECTRIC LIGHT COMPANY—USER OF HIGHWAY—ERECTION OF POLES IN STREET.

The powers conferred upon the Toronto and Niagara Power Company by sections 12 and 13 of its Act of incorporation of 1902, remain intact notwithstanding the provisions of the Railway Act, R.S.C. 1906, ch. 37, and that company is entitled to erect poles for the purpose of stringing power of transmission lines along the streets of a municipality, without the consent of the municipality.

[*Toronto and Niagara Power Co.* v. *Town of North Toronto, ante*, p. 379, reversed on appeal.].

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APPEAL by special leave from a judgment of the Court of Appeal (February 1, 1912, *ante*, p. 379), reversing a judgment of the Chancellor of the High Court (September 29, 1911) and dismissing the appellants' action.

The question decided was whether the appellants are entitled under the powers vested in them by their Act of incorporation (Canadian Act, 2 Edw. VII. ch. 107) to go upon the streets or highways of the Town of North Toronto for the purpose of erecting poles to carry their transmission or power lines for the purpose of selling and distributing electric power.

On July 24, 1911, the appellants sued for an injunction to restrain the respondents from interfering with their work along Eglinton Avenue in the said town. The trial Judge held that they were entitled as claimed subject to complying with certain requirements of the Railway Act of Canada. The Court of Appeal held that they were not so entitled without the leave and license of the respondent corporation.

The provisions of the incorporating Act are summarized in their Lordships' judgment.

The trial Judge considered that the provision in section 13 of their Act that the appellants were not to incommode the public use of the streets only applied to the erection of the poles and not to the subsequent transmission of power, and he thought that the appellant company's undertaking to submit to the direction of the engineer of the Railway Board obviated the difficulty arising from the grave danger of stringing high voltage wires over telephone and other low voltage wires. He held that the appellants were bound to deposit a plan and book of reference of their proposed line, but that they did not require any further permission for the occupation of the public streets.

In the Court of Appeal, Moss, C.J., after an examination of sections 12, 18 and 21 of the Incorporating Act, sec. 90 of the Railway Act of Canada, 1888 (51 Vict. ch. 29), and its amendment by 62 & 63 Vict. ch. 37, sec. 1, re-enacted with additions by sec. 195 of 3 Edw. VII. ch. 58, and finally by sec. 247 of R.S.C. 1906, ch. 37, held that there was no inconsistency between the provisions of secs. 12 and 13 of the incorporating Act and those of sec. 90 of the Railway Act, 1888, as amended. His decision accordingly was that the appellants were bound to obtain the consent of the respondent corporation before erecting their poles. The remaining Judges concurred, Maclaren, J., adding that the question was governed by sec. 247 of the Railway Act, 1906,

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which made it obligatory on the appellants to obtain the respondents' consent and to submit to the supervision of such person as they might appoint subject to an appeal to the Railway Board.

Nesbitt, K.C., *Atkin*, K.C., and *McCarthy*, K.C., for the appellants, contended that the powers given to them by their Act of incorporation were full and complete and clearly included a power to erect poles on the highways of the respondent corporation without their consent. The appellants were the first company to undertake the distribution of Niagara power in the Province of Ontario. Their Dominion Act of incorporation gave them special rights to enable them to carry out their undertaking which the Act declared to be for the general advantage of Canada. Sections 12 and 13 were referred to. It was contended that sec. 90 of the Railway Act of 1888 did not apply, for sec. 21 of the incorporating Act only rendered it applicable to the appellant company and its undertakings so far as it was not inconsistent with the provisions of the said Act. The ruling of the Court of Appeal that the consent of the municipality was necessary defeated the object and intent of the Dominion Parliament in giving to the appellants their statutory powers. Further, the provisions of sec. 90, applicable to a railway company possessing powers ancillary to its main object of constructing and maintaining lines for the conveyance of power or electricity, were not intended to apply to a company like the appellants, the main purpose of whose existence was to construct and maintain such lines in order to furnish electricity or power "through over along and across any public highway." Reference was made to *City of Montreal* v. *Standard Light & Power Co.*, [1897] A.C. 527. It was not the intention of the Legislature by that section so completely to cut down the appellants' exercise of their special statutory powers and to make their very existence dependent upon the will of the various municipalities within the territory which they were authorized to supply with electricity. If such intention had existed it would have been clearly expressed by apt words in the special Act. Even if the consent of the municipality were necessary it could not be arbitrarily withheld. No machinery exists for restraining a municipality from arbitrarily or improperly withholding its consent. The Board of Railway Commissioners had no power to interfere and had so determined in regard to the present contention.

Sir R. Finlay, K.C., and *T. A. Gibson*, K.C., for the respond-

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ents, contended that there was no inconsistency between the provision in sec. 90 of the Railway Act of 1888 as amended by sec. 195 of the Railway Act of 1903 and sec. 247 of the Railway Act of 1906, to the effect that the appellants must obtain the consent of the municipality concerned, and the provisions in secs. 12 and 13 of the appellants' incorporating Act. Consequently sec. 90 or its later substitute applies, and, therefore, the appellant company must as a condition precedent to the exercise of its statutory powers, apply for and obtain the consent of the municipality which has jurisdiction over the highway on which they propose to erect their poles and wires. Large powers were given to the appellants by their incorporating Act, and it was most necessary that such powers, exercisable as they were in large cities such as Toronto and Montreal, should be exercised under adequate supervision. The respondents were entitled and bound in the interests of public safety to stop the unauthorized erection of poles and electric wires in the town of North Toronto. The appellants should have applied for the respondents' consent; if they had failed to obtain it, they should have applied to the Railway Board. The effect of the sections cited when read together is to give to the respondents in the first instance, and to the Railway Board on appeal, the power to decide whether the proposed poles would incommode the public use of the streets. It was not suggested that the respondents had in order to preserve such public user, attempted to impose any unfair conditions on the appellants, in which case there would have been a remedy by appeal to the Railway Board under the incorporated provisions of sec. 247 of the Railway Act of 1906.

Nesbitt, K.C., in reply.

July 24, 1912. The judgment of their Lordships* was delivered by

VISCOUNT HALDANE, L.C.:—The question raised by this appeal is whether the appellants may enter upon the streets of the Town of North Toronto for the purpose of erecting poles to carry power lines for the conveyance of electricity. Chancellor Boyd, the trial Judge, decided that they had such pwer, but subject to compliance with certain conditions. The Court of Appeal of Ontario reversed his judgment, holding that the appellants had

*Present: Viscount Haldane, L.C., Lord Macnaghten, Lord Dunedin, Lord Atkinson, and Sir Charles Fitzpatrick.

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no such power unless they had first obtained the leave and licence of the respondents. The only question which arises is as to the necessity of such leave and licence, and the argument depends entirely upon the construction of certain statutes of the Parliament of Canada. By their Act of incorporation which was passed by the Parliament of the Dominion in 1902 the appellants were given powers which, if not cut down by other legislation, are sufficient to justify their action. The material provisions of the Act of incorporation may be summarized as follows. By sec. 12 the appellants were, amongst other things, empowered to establish works for the production and sale of electricity, and to construct the lines of wire and poles which they might require. They were enabled to conduct and supply electrical power and to conduct it along wires at any places through, over, along, or across any public highway, and to enter upon any lands on either side of their wires or conduits, and remove trees or other obstructions, as well as to enter on private property and take such parts of it as were necessary for their lines of wire, poles, or conduits. In the event of the company taking private property, which they were empowered to do, certain provisions of the Railway Act, which by a subsequent section were incorporated, were, in case of disagreement or of questions as to damages, to apply.

By sec. 13 the appellants were given power to erect poles and construct trenches and conduits and to do all things necessary for the transmission of power, heat, or light, as fully as circumstances might require, provided the same were so constructed as not to incommode the public use of streets, highways, or public places, and they were made responsible for all damage caused by them in the carrying out or maintenance of these works.

By sec. 18 the appellants were empowered to make surveys and a map of the lands through or under which these works were to pass or be operated, they were empowered to make a book of reference for the works, and to deposit it, as required by the Railway Act with respect to plans and surveys, by sections or portions less than the whole length of the works, and on such deposit of the map or plan or book of reference of any such section or portion all the sections of the Railway Act were to apply as if the surveys and levels had been taken of the lands through or under which the whole of the works were to pass and the book of reference for the whole had been deposited.

By sec. 21, secs. 40 to 61, sec. 90, secs. 93 to 98, and secs. 136 to 169 of the then Railway Act, 1888, as amended by the Railway

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Act, 1899, were to apply to the appellants and their undertakings in so far as these sections were not inconsistent with the provisions of the Act of incorporation, and subject to the provision that wherever in the Railway Act the word "company" occurred it should mean the company by the Act of incorporation incorporated, and that wherever in the Railway Act the word "railway" occurred it should, unless the context otherwise required, and in so far as it applied to the provisions of the Act of incorporation, mean the works, conduits, lines, cables, or other works thereby authorized to be constructed.

The only one of the above sections of the Railway Act which affects this case is sec. 90.

The Act of incorporation appears to their Lordships to give to the appellants, unless the powers which it *primâ facie* confers are restricted by the Railway Act, very large powers which entitle the appellants to succeed in the present action. If it can be taken by itself their Lordships are of opinion that the Act shews that the Parliament of Canada treated the company, the works of which were expressly declared to be for the general advantage of Canada, and so brought within sec. 91 of the British North America Act, as proper to be entrusted with freedom to interfere with municipal and private rights. For this there may well have been, on the balance of advantages, good reason—the purpose of the company being to bring electric power from Niagara Falls to parts of Canada, to reach which its lines would have to pass through a series of municipal areas. To make its powers of entry subject to the veto of each municipality might mean failure to achieve its purpose. It is, therefore, not surprising that a pioneer company such as this should have been given large powers.

But while *primâ facie* such powers were given, their Lordships collect from other legislation of the period that the Legislature was fully aware of the difficulties of giving such powers without restriction, and that the question of safeguards was present to the minds of the draftsmen. Companies which had power to bring electrical power and wires into Canadian cities might prove a serious danger to the public. The evidence in the present case shews the peril to the safety and the lives and property of the inhabitants of a populous district which a high voltage, such as that of a power company, might occasion. The Parliament of Canada, not unnaturally anxious to avoid

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dangers of this kind, accordingly passed general statutes conferring upon municipal authorities large powers of control. Section 90 of the Railway Act, 1888, was amended by the Railway Act, 1899, which added to is a sub-section illustrative of this kind of control.

The new sub-section enacted that when any company had power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or for the conveyance of light heat, power, or electricity, such company might, *with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place,* enter thereon for the purpose of exercising such power, and break up and open any highway, square, or other public place. Certain further restrictions on the manner of exercise of these powers by the company then follow.

If the powers conferred by this section displaced the less restricted powers of entering without any consent conferred by the Act of incorporation, the appellants are in the wrong. Their Lordships have, therefore, to determine this question. They have to bear in mind that a Court of Justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes read as a whole. The general Railway Act, of 1888, as amended by that of 1899, was repealed and re-enacted with some modifications by the Railway Act of 1903, and this Act, was in its turn, repealed and re-enacted, again with some modifications, by the Railway Act of 1906. The Interpretation Act (R.S.C. ch. 1, sec. 20) provides that in such a case any reference to any unrepealed Act (*e.g.*, in the present case the Act of incorporation) to a repealed Act is to be construed as a reference to the provisions of the substituted Act (in this case the Act of 1906) and that, if there is no provision in the substituted Act relating to the same subject-matter, the repealed Act is to stand good and be read as unrepealed in so far, and in so far only, as is necessary to give effect to it.

Turning then to the general Railway Act of 1906 in order to see what light its language throws on the question whether the powers originally conferred in 1902 by the Act of incorporation still stand unrestricted, the first observation to be made is that the draftsman has used language which expresses an intention to save all such powers.

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By the definition section (2) "company" means a railway company, and "Special Act" means any Act under which the company had authority to construct or operate a railway, or which is enacted with special reference to such railway. By section 3 the general Act is to be construed as incorporated with the Special Act, and, unless otherwise provided in the general Act, where the provisions of the general Act and of any Special Act passed by the Parliament of Canada related to the same subject-matter the provisions of the Special Act shall, in so far as was necessary to give effect to such Special Act, be taken to override the provisions of the general Act.

By section 4 if in any Special Act passed by the Parliament of Canada previously to February 1, 1904, it is enacted that any provision of the Railway Act, 1888, or other general railway Act in force at the time of the passing of such Special Act, is excepted from incorporation therewith, or if the application of any such provision is by such Special Act, extended, limited, or qualified, the corresponding provision of the general Act is to be taken to be excepted, extended, limited, or qualified, in like manner.

By section 247 when any company is empowered by Special Act of the Parliament of Canada to construct, operate, and maintain lines of telegraph or telephone or for the conveyance of light, heat, power or electricity, the company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising its powers, and may, subject to certain restrictions, break up the ground. If the company can not obtain leave from the municipality it may apply to the Board of Railway Commissioners, and the Board had discretion to grant such leave. Section 248 specially defines the word "company," for the purposes of that particular section to include a telephone company, and imposes restrictions on the powers of such companies to construct, maintain, or operate their lines of telephone upon, along, across, or under any highway, square, or other public place in any city, town, or village, without the consent of the municipality.

The materiality of this section, which is to apply notwithstanding any provision of any Act of the Parliament of Canada, is that it shews that where the Legislature intended to interfere with the powers of companies other than railway companies, it did so by special provision.

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Section 247, in the opinion of their Lordships, applies so far as the wording of the section itself is concerned, only to companies within the definition clause, that is to railway companies. Railway companies may have powers to construct lines of telegraph or telephone, or for the conveyance of light, heat, power, or electricity. When they have such powers, and no special power to enter on municipal property, the section empowers them to do so, if the municipality consented and under restrictions. But if by its Special Act the railway company had been in terms given larger and less restricted powers of the same kind, sections 3 and 4 already referred to shew that these special powers are saved. An exception to this appears in sub-section (*g*) of section 247 where the Board of Railway Commissioners is given jurisdiction to abrogate rights given by the Special Act to the extent of requiring the lines to be placed underground.

As to this sub-section, two observations must be made. The first is that no question of its application is raised in this litigation. The second is that the application of the sub-section is excluded by the wording of section 21 of the Act of incorporation. It is inconsistent with the provisions of that Act, for it is in reality only one of the provisions of the Railway Act of 1906 relating to railway companies, and is therefore excluded.

The only way in which section 247 of the Railway Act of 1906 is applicable to the appellants is by the language in which it is made applicable by section 21 of their special Act. But if the provisions of section 90 of the Railway Act, 1888, as amended by the Railway Act, 1899, and in substance re-enacted with additions by the Railway Acts, 1903, and 1906, are, as appears to be the case, kept alive by the Interpretation Act, these provisions are declared by section 21 of the special Act applicable only in so far as they are not inconsistent with the provisions of that Act. Moreover, the definitions of "company" and "railway" in section 21 make sections 3 and 4 of the Railway Act, 1906, apply so that the provisions of the appellants' Act of incorporation override and extend the provisions of section 247. In the result it appears to their Lordships that the powers conferred by sections 12 and 13 of the Act of incorporation of 1902 remain intact.

In the Courts below the trial Judge decided in favour of the appellants on the question of power to enter and erect their poles without consent.

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A point was discussed as to the deposit of plans under sec. 18, which it is now agreed does not arise. The Court of Appeal took a different view. They held that the general restrictions imposed by section 90 of the Act of 1888, as amended by the Act of 1899, and by section 247 of the Act of 1906, were not inconsistent with the provisions of sections 12 and 13 of the Act of incorporation. For these reasons their Lordships can not agree with this opinion. They will, therefore, humbly advise His Majesty that this appeal should be allowed, and that it should be declared that the appellants are entitled to a declaration that they are at liberty to erect poles for the purpose of stringing transmission or power wires along Eglinton avenue without the consent of the respondents, and to have the latter restrained from interfering with them in doing so. The respondents must pay the costs of this appeal and in the Courts below.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

NEGLIGENCE.

PATTISON v. CANADIAN PACIFIC RY. CO.

(24 O.L.R. 482.)

Ontario High Court, Boyd, C. September 19, 1911.

1. CROSSING OF ONE RAILWAY BY ANOTHER—LEAVE OF BOARD—TERMS OF ORDER—INTERLOCKING PLANT—SIGNALMAN—HIRING BY ONE COMPANY AND PAYMENT BY THE OTHER.

The Board granted the application of the Canadian Pacific Railway Company to cross the track of the Canadian Northern Railway Company upon the terms that the applicant should, at its own expense, insert a diamond in the track, provide, maintain and operate an interlocking plant including the cost of keeping a signalman in charge of the crossing. The signalman was appointed by the Canadian Northern to the satisfaction of both companies. While a Canadian Pacific train was approaching the crossing the signalman, being intoxicated, derailed the train killing the fireman.

2. NEGLIGENCE—INJURY AND DEATH OF SERVANT OF ONE COMPANY—LIABILITY OF COMPANY USING SERVICE AT TIME OF INJURY.

The Canadian Pacific Railway Company was held liable in damages for the death of its servant the fireman, because it was alone responsible for the negligence of the signalman, who, at the time of the accident, while adjusting the points and giving the signals for its train, was to be regarded as a person in its employment.

The whole circumstances of the employment must be looked at and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring and paying.

[*Hansford* v. *Grand Trunk Ry. Co.* (1909), 13 O.W.R. 1184, at p. 1187, specially referred to.]

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ACTION by Margaret Pattison, widow of Samuel Pattison, a locomotive fireman employed by the defendants the Canadian Pacific Railway Company, against that company and the Canadian Northern Railway Company, to recover damages for his death, alleged to have been caused by the negligence of the signal-man at a crossing of the two railways.

The action was tried before BOYD, C., without a jury, at Port Arthur.

F. H. Keefer, K.C., for the plaintiff.

W. H. Curle, for the defendants the Canadian Pacific Railway Company.

F. R. Morris, for the defendants the Canadian Northern Railway Company.

September 19, 1911. BOYD, C.:—There is no dispute about the facts. The accident happened in September, 1910, where the track of the Canadian Northern Railway was crossed by the track of the Canadian Pacific Railway at a place known as Wood Crossing: the signal-man in charge was guilty of gross negligence—blundered in his signals so that the train of the Canadian Pacific was derailed and its fireman killed. It is not disputed that his widow should recover as damages $4,250 if either defendant is liable; the dispute is as to such liability *inter se*.

The Canadian Northern was the senior road in possession of the track, and the Canadian Pacific made application to the Dominion Board of Railway Commissioners for leave to cross that track, which was granted in April, 1908, by order of the Board, upon the usual terms, that the applicant should insert a diamond in the track with interlocking plant, at its own expense; that the Canadian Northern should appoint a competent man to be in charge of the crossing; and that the applicant should bear and pay the whole cost of providing, maintaining, and operating the said interlocking plant, including the cost of keeping a man in charge of the crossing.

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A competent man was appointed to the satisfaction of both defendants, and no complaint arose till the night in question, when the man in charge became intoxicated, and so occasioned the disaster. The service at the place and time in question was being performed solely in behalf and for the benefit of the Canadian Pacific.

The Canadian Pacific Railway Company defends on the ground that the signal-man was not the servant or agent of that company. The Canadian Northern Railway Company defends on the ground that the signal-man was at the time in the service and under the control and direction of the Canadian Pacific Railway Company, and that the Canadian Northern Railway Company was not concerned with or interested in or benefited by what was being done in the operation of the other road.

The question of liability, in these circumstances, was brought before the Railway Board prior to the accident and irrespective thereof, and a ruling was given by the Chief Commissioner, which is pertinent to the present litigation. I quote from his deliverance, which is to be found at p. 305 of the 4th report of the Board of Railway Commissioners for Canada for the year ending the 31st March, 1909.

He says: "I think from every point of view, in fairness to both roads, this signal-man should be regarded as a joint employee of each; and that, when one steam road applies for leave to cross another at grade, permission should be given, where an interlocker is to be installed, only upon condition that the companies place in charge of the interlocker a competent joint signal-man . . . selected by the senior company and liable to dismissal for cause upon complaint or objection by the junior company; and that then each company shall be liable for all the loss or damage suffered or sustained on its own lines by its patrons or employees or to its property caused by the negligence of the joint signal-man; and in no event shall the companies, as between themselves, be liable for any loss or damage of any nature

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or kind whatsoever happening upon the line or lines of the other and caused by or arising from the negligence of such signal-man."

This ruling was in March, 1909, and does not authoritatively control the relative liability of the defendants for what occurred in September, 1910, under the permission to cross granted in April, 1908; but it is a valuable exposition of the mind of the Railway Board as to the existing legal liability.

Personal injury caused to a workman by reason of the negligence of any person in the service of the railway company who has charge or control of the points or signals is an actionable wrong for which the company is liable under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 3, sub-sec. 5. This man, appointed by the one company and paid by the other, would be a person in charge of the signals at the crossing and interlocking switches, within the meaning of the Act: *Gibbs* v. *Great Western R.W. Co.* (1884), 12 Q.B.D. 208. Was he also in the service of the defendant the Canadian Pacific Railway Company, who paid him and who concurred in his appointment by the other defendant? In the evolution of the law, the old test as to who hired and paid is being modified, if not superseded, by the more modern method indicated in the judgment of Garrow, J.A., in *Hansford* v. *Grand Trunk R.W. Co.* (1909), 13 O.W.R. 1184, at p. 1187: *i.e.*, the whole circumstances of the employment must be looked at, and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring or paying.

The interworking of the lines of the two companies was not a matter of agreement and voluntary contract, but was imposed upon them by the act of a statutory body; and I think the proper legal outcome as to liability in case of negligence is, that the common signal-man is to be regarded as the person employed by the company for which he is adjusting the points and giving the signals.

If the order of the Board, coupled with its directions and conditions, be regarded as a quasi-contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use on its own

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line of the common servant for the sole prosecution of its own work at the crossing of the other road. The line of reasoning in *Hall* v. *Lees*, [1904] 2 K.B. 602, may be usefully considered.

Or, if the theory of joint service be rejected, and the signalman, so appointed and so paid, be regarded as a servant or agent *sui generis* of both roads, then fairness and good sense would support the proposition that the company for which the signalman was alone acting on the particular occasion, was the principal against whom relief should be sought, if the then agent of that road was guilty of misconduct by which an employee of the road was injured.

The proper conclusion in this case is, that the damages agreed upon be paid by the defendant the Canadian Pacific Railway Company, with costs of action. As to the other defendant, the action is dismissed without costs, as the precise question involved now arises for the first time in the Courts.

See next case.

PATTISON v. CANADIAN PACIFIC RY. CO.

(26 O.L.R. 410.)

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. May 15, 1912.

1. MASTER AND SERVANT (§ II E 5—265)—LIABILITY OF MASTER—"RESPONDEAT SUPERIOR"—QUESTION OF FACT IN EACH CASE.

The application of the rule *respondeat superior* to each particular case depends upon facts and is a question of fact.

[*McCartan* v. *Belfast Harbour Commissioners*, [1911] 2 Ir. R. 143, 44 Irish L.T. 223, referred to.]

2. MASTER AND SERVANT (§ II E 5—265)—LIABILITY OF MASTER—SIGNALMAN APPOINTED BY ONE RAILWAY COMPANY—ANOTHER RAILWAY GRANTED RIGHT TO CROSS LINE—NEGLIGENCE OF SIGNALMAN.

Where a railway company applies to the Railway Board under section 227 of the Railway Act, R.S.C., ch. 37, for leave to cross the line of another railway company, and the Board, by its order giving leave to cross, directs that an interlocking plant shall be established at the crossing at the expense of the applicant company, and that the other company, whenever it desires to make use of the crossing, shall be entitled, upon notice to the applicant company, to place a signalman in charge thereof, whose wages are paid by the company appointing him and reimbursed to it by the applicant company, the signalman so appointed is the servant of the company appointing him, and that company, and not the applicant company, is liable to a servant of the

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applicant company who is injured by the negligence of the signalman in passing a train of the applicant company over the crossing.

[Judgment of Boyd, C., *Pattison* v. *C.P.R.*, 24 O.L.R. 482, reversed, Garrow, J.A., dissenting.]

APPEAL by the defendant the Canadian Pacific Railway Company from the judgment of BOYD, C., *Pattison* v. *Canadian Pacific R. Co.*, 24 O.L.R. 482, *ante*, p. 401.

The appeal was allowed, GARROW, J.A., dissenting.

I. F. Hellmuth, K.C., and *Augus MacMurchy*, K.C., for the appellant. Frank Leland, whose negligence was the cause of the accident, was not the servant of the appellant. The evidence shews that Leland was appointed to take charge of the crossing by the Canadian Northern Railway Company, in pursuance of an order of the Board of Railway Commissioners, and that the appellant had no part or voice in his selection, appointment, hiring, or dismissal, exercised no supervision, discretion, or control over him in the performance of his duties, and was not responsible to him for his wages, nor was he responsible to the appellant for the performance of his duties or subject to the appellant's direction or control: *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1868-9), L.R. 3 Ex. 330, L.R. 4 Ex. 238; *Grand Trunk R.W. Co.* v. *Huard* (1905), 36 Can. S.C.R. 655, especially at p. 670; *Stewart* v. *Pere Marquette R.W. Co.* (1905), 6 O.W.R. 724; *Donovan* v. *Laing Wharton and Down Construction Syndicate, Limited*, [1893] 1 Q.B. 629; *Hansford* v. *Grand Trunk R.W. Co.* (1909), 13 O.W.R. 1184; Fourth Annual Report of the Board of Railway Commissioners, p. 304. The learned trial Judge erred in regarding Leland as a joint or common servant of the two defendants, or as alternately the servant of the one or the other of them according to the service performed and benefit received by each. The rule of *respondeat superior* arises out of the relation of superior and subordinate; and we submit that this relationship did not exist between the signalman and the appellant.

Wallace Nesbitt, K.C., and *Christopher C. Robinson*, for the defendant the Canadian Northern Railway Company. Frank Leland, whose negligence was the cause of the accident, was appointed under and by virtue of the authority contained in an order of the Board of Railway Commissioners for Canada. We submit that this respondent exercised reasonable and proper care in appointing Leland as signalman, as he was a competent person, and his work was satisfactory to the appellant. Under the terms

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of the order of the Board, this respondent was only the paymaster, inasmuch as the wages of the signalman were reimbursed by the Canadian Pacific Railway Company. At the time of the accident, Leland was engaged in the work of passing a train of the appellant across the diamond, and this respondent was in no way interested in such work, and derived no benefit therefrom, nor was Leland subject to the control of any officer of this respondent. We submit that Leland, while so engaged, was under the sole control and direction of the appellant, and was the servant of the appellant alone. This respondent is, therefore, not liable for the consequences of Leland's negligence. A.'s servant may become B.'s on a particular occasion and for a particular purpose, notwithstanding that he continues in A.'s service and is paid by him: *Union Steamship Co., Limited* v. *Claridge,* [1894] A.C. 185, at p. 188. It is the company for which the act is being performed at the time that is responsible, where the servant has been compulsorily appointed. We refer to the following authorities: *Warburton* v. *Great Western R.W. Co.* (1866), L.R. 2 Ex. 30; *Swainson* v. *North Eastern R.W. Co.* (1878) 3 Ex. D. 341; *Hansford* v. *Grand Trunk R.W. Co.,* 13 O.W.R. 1184; *Hall* v. *Lees,* [1904] 2 K.B. 602.

C. A. Moss, for the plaintiff, asked, in the event of the appeal being allowed, for leave to appeal as against the Canadian Northern Railway Company, and for judgment against that company.

Hellmuth, in reply, referred to *Dewar* v. *Tasker and Sons, Limited* (1907), 23 Times L.R. 259; *The Sussex,* [1904] P. 236, at p. 251; *The Halley* (1868), L.R. 2 P.C. 193; *Jones* v. *Scullard,* [1898] 2 Q.B. 565, at p. 573.

May 15, 1912. Moss, C.J.O.:—This appeal, though nominally and in form an appeal against the plaintiff, is in substance and reality an appeal against the defendant the Canadian Northern Railway Company. At the trial, and again on the argument of the appeal, it was admitted that the unfortunate accident which caused the death of the plaintiff's husband was due to the gross negligence of one Frank Leland, who was operating the points and signals in connection with the interlocking plant at Ward's crossing.

The amount of damages to be paid by the company ultimately held liable was agreed upon and fixed at $4,250.

The only question tried and debated was, which one of the defendants was answerable for the consequences of Leland's negligent act?

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The solution of that question is to be found by ascertaining from the facts established in evidence whose servant Leland was, in fact and law, when he committed the negligent act. And, as has been many times observed, the answer depends upon the facts and the proper inferences to be drawn from them. The recent case in the House of Lords of *McCarton* v. *Belfast Harbour Commissioners,* [1911] 2 Ir. R. 143, 44 Irish L.T. 223, was one in which action was brought for personal injuries to the plaintiff while engaged in helping to unload a ship. A crane, the property of the defendants, was hired to the master of the ship for unloading purposes. The crane was in charge of and worked by a servant employed by the defendants. The plaintiff was working under employment by the master of the ship, and was injured through the negligence of the craneman. There was judgment for the plaintiff, and ultimately an appeal to the House of Lords. It was contended for the defendants that *quoad* the work on which he was engaged at the time of the accident the craneman was the servant of the master of the ship, and not the defendants' servant. The Lord Chancellor said: "I regard this case as one purely of fact, in which no point of law is in dispute. The question on which the decision hinges is this: Was the man, whose negligence caused this accident, acting as servant of the defendants in doing what led to the mishap, or as servant to the master of the vessel which was being unloaded?" And Lord Dunedin said (p. 226): "There is no principle involved in . . . this case except the principle which I have already mentioned, which is compendiously described by the brocard *respondeat superior*, and as to which no one entertains any doubt. The application of that principle to each particular case depends upon facts, and is a question of fact . . ."

The present case having been tried without a jury, and there being no substantial difference as to the facts, we are free of the difficulties which sometimes arise in dealing with findings upon disputed facts. It only remains to endeavour to make the proper application of the facts and the inferences to be drawn from them, in order to ascertain which of the two companies is liable.

The learned Chancellor has held the defendant the Canadian Pacific Railway Company liable, basing his conclusion, as I read his opinion, upon three grounds: (*a*) that, Leland being the common signalman, the proper legal outcome as to liability in case of negligence is, that he was to be regarded as the person employed by the company for which he was adjusting the points and giving

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the signals; (*b*) if the order of the Board of Railway Commissioners, coupled with its directions, be regarded as a *quasi* contract or in the nature of a contract between the companies, the rules of common law would place liability on the company which was making use on its own line of the common servant for the sole prosecution of its sole work at the crossing; (*c*) or if, rejecting the theory of joint service, and regarding Leland, appointed and paid in the manner in which he was, as the servant or agent *sui generis* of both companies, then fairness and good sense would support the proposition that the company for whom he was alone acting on the particular occasion was the principal against whom relief should be sought in case of misconduct on Leland's part occasioning injury to an employee of the last-mentioned company.

But, however strongly these propositions may appear to be consistent with what should be fair as between the two companies, I am, with deference, unable to think that they can be considered as decisive of the question in issue here. In order to give effect to them, it must be first found that Leland was the common servant of the companies. He was, it is true, the common signalman, in the sense that he was the only one in charge; but it by no means follows that he was the servant of both companies. It must depend upon the circumstances of his engagement, the nature of the duties he owed to the respective companies, and the extent of the control over his conduct and actions vested in each of them.

The occasion for the employment of a person performing the duties which Leland was engaged in, arose out of the application of the Canadian Pacific Railway Company to the Board of Railway Commissioners for leave to cross the track of the Canadian Northern Railway Company's spur line to their gravel pit at the point in question. The Board granted the leave, but directed that the Canadian Pacific Railway Company should, at its own expense, under the supervision of an engineer of the Canadian Northern Railway Company, insert a diamond in the track of the latter company at the point of crossing, and that the crossing be protected by an interlocking plant, derails to be placed on the lines of both companies on both sides of the crossing, the derails to be interlocked with home and distant signals. Then followed directions bearing directly on the question here, viz.: (4) that, during such period of the year as the line of the Canadian Northern is not being operated, the signals and derails be set

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and placed so as to permit the crossing to be safely made by trains of the Canadian Pacific, without stopping, and that, during such period, it shall not be necessary to have a man in charge of such crossing; (5) that the Canadian Northern Railway Company be entitled to place a man in charge of such crossing whenever the said line is to be operated by that company, upon giving to the Canadian Pacific Railway Company at least 48 hours' previous notice in writing of its intention so to do.

Thus far it will be seen that, so long as the Canadian Northern Railway Company is not operating its line, no necessity for having a man in charge of the crossing exists, and it is only when the Canadian Northern Railway Company desires to operate its line that a man is to be placed in charge. Until the arrival of that time, the Canadian Pacific was free to use its line for all proper and legal purposes without hindrance at the crossing. The next material directions are: (7) that the man in charge of the interlocking plant be appointed by the Canadian Northern; and (8) that the Canadian Pacific bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. With these should be read the stipulations of clause (6) that, in the movement of trains of the same or of a superior class over the crossing, the trains of the Canadian Northern have priority.

So that, when the occasion for placing a man in charge arises, his appointment is to be made by the Canadian Northern, and he is to be paid in the first instance by it. The Canadian Pacific is to indemnify the Canadian Northern for the cost of keeping him in charge, but otherwise there is nothing expressed which would give the Canadian Pacific any control over or power of interference with him in the performance of his duties. Complete control of the interlocking plant and of the man in charge is left to the Canadian Northern, and in the movement of trains are to have priority. The evidence shews that the two companies so interpreted the effect of the order. The man in charge was invariably appointed by the Canadian Northern without any previous communication with the Canadian Pacific; and it nowhere appears that it ever interfered with the man in the performance of his duties. It was, of course, open to the Canadian Pacific to complain to the Canadian Northern in case of neglect or failure of the man to attend to his duties; but it had no power to dismiss or even suspend him. It was, of course, part of his duty to pay attention to the signals from trains of the Canadian Pacific ap-

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proaching the crossing, and to set and place the signals and derails so as to permit the crossing to be safely made as soon as the traffic on the Canadian Northern Railway Co.'s line permitted. But such acts as these cannot be so classed as to convert them into orders or directions given to him as a servant of the Canadian Pacific Railway Company. As the case appears to me, it is the simple case of a man employed and paid by the Canadian Northern Railway Company, subject only to its orders and subject only to dismissal by it, acting on its behalf as the company having sole control of the interlocking plant, but under obligation to permit the crossing to be safely made by the Canadian Pacific Railway Company's trains, though in subordination to the Canadian Northern Railway Company's trains.

And, in my opinion, no question of joint or common employment or agency arises. Leland was at the time engaged in permitting a Canadian Pacific train to make the crossing in response to its signal, and his negligent act was in displacing the points after he had permitted the train to proceed.

I think that negligent act was committed by Leland as the servant of the Canadian Northern Railway Company, and that it should be held liable for the damages.

This conclusion gives rise to another question, which was raised and partially discussed upon the argument of the appeal. The plaintiff has not appealed against the Canadian Northern Railway Company, nor asked that, if the judgment against the Canadian Pacific Railway Company be set aside, judgment for the damages should be entered against the Canadian Northern Railway Company. Upon the argument of the appeal, counsel for the plaintiff asked to be allowed to appeal so as to obtain judgment against the Canadian Northern Railway Company.

The case seems a proper one for giving this relief, and it should be granted. But the Canadian Northern Railway Company may be advised that, in order to render unnecessary any further argument, it would be proper to submit to judgment in the same way as if an appeal had been brought by the plaintiff in the first instance.

In that case, judgment may go setting aside the judgment against the Canadian Pacific Railway Company, and directing judgment to be entered against the Canadian Northern Railway Company, with costs throughout to the plaintiff and the Canadian Pacific Railway Company.

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If, however, it is deemed necessary by any of the parties, the matter may be mentioned again.

MACLAREN, J.A., concurred.

MEREDITH, J.A.:—I am quite unable to agree with the trial Judge in his views of this case.

I am quite unable to understand how any one who does not hire or pay, and who cannot discharge, order, or control, a servant employed and paid and subject to discharge by, and to the orders and control of, another person only, can be considered the master of or answerable for the misconduct of such a servant: manifestly, I would have thought, the master could be only he who employed, paid, and discharged the servant, and to whose orders and control solely he was subject.

In this case the Canadian Northern Railway Company hired, paid, and discharged all the signalmen of the crossing where the accident happened, who were all subject to the orders and control of that company solely. The Canadian Pacific Railway Company had no voice in any of these things, they had no power whatever over any of them, nor ever assumed or attempted to exercise any authority respecting them: their only right was that of any other stranger to the contract between master and servant, to complain to the master if they had fault to find with any act of the servant; but even that was never done.

How then is it possible, rightly, to hold the Canadian Pacific Railway Company liable for his negligence in the performance of his duties in such a service? Because that company was bound to recoup the other in the amount expended in his wages, cannot have any such effect: see *The Slingsby* (1903), 120 Fed. Repr. 748, and *Swainson* v. *North Eastern R.W. Co.*, 3 Ex. D. 341.

The narrow ground upon which the trial Judge held that the Canadian Pacific Railway Company is liable, was, in my opinion, based upon error in fact as well as in law. It is not a fact that, in doing that which caused the accident, the signalman was acting upon the request, or at the instance, or for the benefit, of that company. When their train was approaching the crossing, the signals of safety were set upon the line which gave them a clear right of way: there was no need for, or to signal for, any service on the part of the signalman; it was the right and the duty of the train to go on as it did; the difficulty arose not from any service

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needed or asked for by those in charge of the train, but by reason of the other company's tipsy servant interfering with that train's right of way, not at the request or instance of the Canadian Pacific Railway Company or for their benefit, but wholly and diametrically opposed to their interests and desires. On the contrary, it was for the benefit of the other company, because his actions made its line safe, in making the Canadian Pacific Railway Company's line unsafe, and throwing the train off the track and killing the plaintiff's husband. It ought not to be necessary, but it seems to be, to say that in making the one line safe the other is necessarily made unsafe; that is the purpose of the interlocking apparatus: in opening the "derailing" switch on the one line, that switch is automatically closed on the other line, giving the only safe right of way to the latter.

One might well differ from the trial Judge with greater hesitancy, were it not that he was under a misapprehension of some of the very material facts of the case when disposing of it; the Canadian Northern Railway Company was not ordered by the Railway Board "to appoint a competent man" to be in charge of the crossing; the order was, that they "be entitled to place a man in charge of such crossing," when the line was to be put in use by them, upon giving forty-eight hours' previous notice to the company. The Canadian Northern Railway Company did not use at all times this part of its road; and so it was at liberty to withdraw the signalman whenever it saw fit not to use it; at which times, if it did its duty, it would see that this interlocking switch was securely locked so as to give the right of way all the time to the other company's line; and so the signal service was all the more under its control and in its charge and keeping.

It was also incorrect to say, as the trial Judge did, in his reasons for deciding against the Canadian Pacific Railway Company, that a competent man was appointed to the satisfaction of that company; that company was in no way consulted about the appointment of any of the several signalmen, and knew nothing about them, nor had anything to do with them, but had to, and did, submit to all such appointments as the other company chose to make.

So, too, to say that the signalman was in the service of the Canadian Pacific Railway Company, which paid him and concurred in his appointment; and that the service at the time and place in question was being performed solely on behalf of and for

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the benefit of that company. If these things had been as they are incorrectly stated, a very different case would be presented for consideration on this appeal.

Judging only from the quotation from them made by the trial Judge, it seems to me to be obvious that the views expressed by the Chairman of the Railway Board, upon the application which was then before him, which had nothing to do with this matter, have been misapplied to this case. The Chairman was evidently dealing with the question of what should be the form and effect of the order to be made upon an application for crossing facilities; not in any sense as to the effect of the order which had been made in this matter; if it had been otherwise, I cannot think that any one could agree with him; as they are even, there may be very different opinions.

It would certainly be a new and unfortunate state of affairs if one were to be held answerable in damages for the misconduct of a servant in whose appointment he had no voice, and who was not subject to his orders or control, nor hired or paid by him, and who was not acting upon his request or at his instance or for his benefit, but the very opposite, in the misconduct which caused the injury: a man to whose directions, at the crossing, they were bound to conform: not he to theirs.

The case seems to me to be a very plain one of liability of the Canadian Northern Railway Company at common law; and not of liability of the Canadian Pacific Railway Company under the Workmen's Compensation for Injuries enactments, or otherwise.

Since this opinion was written, I have had an opportunity of perusing the ruling of the Railway Commissioners referred to in it, and find that it is entirely in accord with the views I have expressed in all respects. It is there said by the Chief Commissioner, among other things: "I think, in all cases where the Board has made crossing orders, the man in charge of the interlocker has been regarded as the employee of the senior" —the Canadian Northern Railway—"company only, in which event, if, through his carelessness or negligence, damages arise to the servants or employees of the junior company, recovery must be had against the senior company."

MAGEE, J.A.:—The Railway Act, R.S.C. 1906, ch. 37, in sec. 151, clause (*c*), gives each company the power to cross any railway, as by clause (*d*) it gives power to carry the railway across the lands of any person; but, by sec. 227, it directs that the cars

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shall not so cross another railway until leave therefor has been obtained from the Board of Railway Commissioners; and, upon application for such leave, the Board may direct that such works and appliances be installed, maintained, and operated, watchmen or other persons employed, and measures taken, as appear to the Board best adapted to prevent danger, and may make other directions; and, by sec. 229, at any such crossing at rail level the Board may order the adoption of such interlocking switch, derailing device, signal system, and appliances, as to render it safe for trains to pass over the crossing without being brought to a stop.

In 1908 the Canadian Pacific Railway Company, which I may call "the Pacific," desired to cross this spur-line of the Canadian Northern Railway Company, which may be called "the Northern," and it did not desire to do so overhead or by a subway, but at rail level; and it made application to the Board to vary a previous order of the 26th December, 1906, by granting permission to use the crossing for other than construction purposes and by having the crossing protected by home and distant signals. The Board's order of the 29th April, 1908, gave: (1) the leave to cross; but directed (2) that the Pacific company, at its own expense, under supervision of an engineer of the Northern company, should insert the diamond at the crossing; (3) that it should be protected by an interlocking plant, derails to be placed on the lines of both companies on both sides and to be interlocked with home and distant signals; (4) that, during such period of the year as the Northern line is not being operated, the signals and derails be set so as to permit the Pacific trains to cross without stopping, and then it should not be necessary to have a man in charge of the crossing; (5) that the Northern company "be entitled to place a man in charge" of such company whenever the line is to be operated by that company, upon giving notice to the Pacific company; (6) that the Northern company's trains have priority; (7) that the man in charge be appointed by the Northern company; and (8) that the Pacific company bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. By another order, of the 7th May, 1908, on the Pacific company's application, and on the recommendation of the Board's engineer, "the applicant company and the railway company," which I suppose means both companies, were authorized to operate trains over the crossing without being brought to a stop.

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Among the rules adopted by the Board for interlocking systems at crossing at rail level, one provides that "when the signals on the distant and home posts indicate safety, the train can proceed."

In September, 1910, the crossing was in operation, and the Northern company was using the spur-line for hauling gravel and other purposes, but the Pacific company had five or six times as many trains crossing as the Northern company. A signalman was in charge, and operated the signals and derails on both lines from a tower, which seems to have been located on the land forming the original right of way of the Northern company, though that is not very clear. No part of that land seems to have been acquired by the Pacific company.

The Pacific company's train, on which the plaintiff's husband was fireman, was proceeding to cross without stopping, as the signals indicated safety, and the signalman in the tower, negligently and without cause or warning, operated the derailing switch on the Pacific company's property and derailed the train, and the fireman was killed.

The negligent signalman had been selected and appointed solely by the Northern company, and was subject only to its control and to dismissal by it. He made reports periodically to that company, and only to it. The Pacific company was not consulted or entitled to be consulted as to his appointment or retention, and had had no voice therein. It could not discharge or even suspend him, and at the most could only complain of any misconduct by him to his employer, the Northern company—but, no doubt, had an ultimate right of complaint against that company itself to the Railway Commissioners. His wages were agreed upon between him and the Northern company and paid by that company without consultation with the Pacific company, but were reimbursed by the latter company to the Northern. He was furnished by the Northern company with its rules for crossings. He also had a copy of those of the Pacific company, but it does not appear how he obtained them. The rules of both companies are, in effect, if not literally, the same, both being approved by the Board. It was necessary for him to have time-tables of both companies, and they were furnished to him. The Northern company's superintendent says that that company "gave instructions to him in connection with the operation." It does not appear that the Pacific company gave any instructions. It is

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stated that generally the senior company—the company whose line is subsequently crossed by another—has the privilege of appointing the signalman at crossings.

As the signalman was not required when the Northern company was not operating that line, nor before the crossing was made, it cannot be said that he was employed for the service of either company as regards danger from its own trains, appliances, or employees. He was authorized to use appliances and perform operations therewith on the Pacific company's property, but any danger he was there to prevent would be a common danger of the Pacific company, apart from danger to the Northern company, his employer. In setting the signals and rails properly for "safety" on the Pacific line, he was doing no more than saying that his employer's trains or track were not going to interfere with the train. In wrongfully moving the derailing appliances, he was saying, "There is danger to my employer's property as well as to you." What actuated him to do as he did does not appear, but it is not at all likely, and it certainly is not proved, that he was seeking to save the Pacific train alone from danger on the Pacific line. What happened was much the same as if the railway watchman at a highway crossing were to signal to a teamster that it would be safe to cross, and then drop the bar across the horse's back.

It is true that the train was derailed by means of an appliance put on the Pacific track by the Pacific company, and which that company assented to being used by the Northern company, through its signalman; but they did not assent to his doing so negligently or improperly, and there was no negligence in giving such assent.

It is not the fact that the engineer or any employee of the Pacific company signalled for any movement of the signals or switches, either then or ordinarily. The signalman of the Northern company controlled the right of the Pacific company's trains to cross, but no employee of the Pacific company had any authority over the signalman.

It is true that the Pacific company had applied for the protection of the crossing by signals, and the signals would necessitate a signalman; but they did not ask for or obtain the control in any way of the signalman. As appears, it is usual for the "senior" company at railway crossings to appoint the signalman. In fact the Pacific company did no more than a municipality

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might do which asked that a railway company should maintain a watchman at a highway crossing.

From the decision of the Board of Railway Commissioners (report for 1909, 44 Sessional Papers, 1910, 20 c., p. 304), mentioned by the learned Chancellor, it is apparent that it was the view of the Board, and it would seem of the railway companies themselves, that, in taking the appointment of the signalman, the senior company was assuming a serious responsibility, which it was felt they should not in future orders be subjected to, and the Board decided that in future orders, made after the 1st October, 1909, it would be provided that the signalman should be regarded as an employee of both senior and junior companies.

Apart from that view, upon the facts here it does not appear that the negligent signalman was in fact, in any sense, in the service of the Pacific company, or that, at the moment of his negligent action or in taking the course he did, he was for the time being acting otherwise than as the servant of the Northern company, which, through him, was unwarrantably placing an obstruction upon the Pacific company's property in the way of the train.

This appeal of the Pacific company should, in my opinion, be allowed, and the plaintiff should have leave to appeal against the judgment in favour of the Northern company; and I agree in the proposed disposition of the costs.

GARROW, J.A. (dissenting):—The plaintiff sues on behalf of herself and the infant children of her late husband, Samson Pattison, to recover damages resulting from his death on the 10th September, 1910, through the alleged negligence of the defendants or of one of them.

The amount of the damages was agreed upon at the trial at the sum of $4,250.

The deceased, Samson Pattison, was in the employment of the defendant the Canadian Pacific Railway Company, as a locomotive fireman. On the occasion in question, he was employed upon an engine attached to a train proceeding from the city of Winnipeg easterly. About seven miles east of Winnipeg, at a place called Wood Crossing, the line of railway of the defendant the Canadian Pacific Railway Company crosses the line of the defendant the Canadian Northern Railway Company, and what there occurred is thus expressed in the statement of claim and admitted in the statement of defence of the defendant the Canadian Pacific Railway Company:—

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"5. Upon approaching the said crossing, the train upon which the said Pattison was working was given the through signal from the distance signal, and, in pursuance of such signal so given, was proceeding along the track, and, when nearing the home signal, the signal was suddenly, through the negligence of the man in charge of the same, reversed, and the derail switch thrown open, thus causing the train to be derailed, which resulted in Pattison's death."

The man in charge of the signals at the crossing was one Leland, who was afterwards prosecuted for manslaughter and convicted. And the sole question in the case is, which of the two defendants should be held responsible for Leland's negligence?

The facts as to Leland's appointment are as follows. The defendant the Canadian Northern Railway Company had what is called a spur line of railway leading to certain gravel pits, used only to reach them. The defendant the Canadian Pacific Railway Company desired to cross this line, and made application for that purpose to the Board of Railway Commissioners for Canada for an order permitting such crossing to be made. And an order dated the 29th April, 1909, was accordingly made. By the terms of the order, it was provided, among other things, that the defendant the Canadian Northern Railway Company should appoint and place a man in charge of the crossing, and that the defendant the Canadian Pacific Railway Company should bear and pay the whole cost of providing, maintaining, and operating the interlocking plant which the order directed should be established at the crossing, including the cost of keeping the man in charge at the crossing.

In pursuance of the order, the interlocking apparatus was put in, and the crossing duly established.

The defendant the Canadian Northern Railway Company appointed Leland and placed him in charge at the crossing on the 30th April, 1909; and he remained in charge until the accident on the 10th September, 1910. He was paid his wages in the first instance by the defendant the Canadian Northern Railway Company, but that company was fully recouped in respect of such wages by the defendant the Canadian Pacific Railway Company.

The learned Chancellor held that the defendant the Canadian Pacific Railway Company alone was liable, under the circumstances, for the damages agreed upon, with costs of action; and with that conclusion I agree.

Such cases are always, in my experience, somewhat difficult of

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easy solution, largely, I suppose, owing to the somewhat nice distinctions and discriminations which must be made. The law itself seems plain and simple enough. It is the facts and the inferences of fact which are troublesome.

The principle of *respondeat superior*, upon which they all rest, is thus expounded by Best, C.J., in *Hall* v. *Smith* (1824), 2 Bing. 156, at p. 160: "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And that a person may, while the general servant of one person, become the particular servant as to a particular act of another person, in other words, serve two masters, cannot now be disputed, in the light of the authorities.

In *Union Steamship Co.* v. *Claridge*, [1894] A.C. 185, at p. 188, Lord Watson said: "That the servant of A. may, on a particular occasion, and for a particular purpose, become the servant of B., notwithstanding that he continues in A.'s service and is paid by him, is a rule recognised by a series of decisions;" to some of which I referred in *Hansford* v. *Grand Trunk R.W. Co.*, 13 O.W.R. 1184, cited by the Chancellor in his judgment.

In a recent case in the House of Lords, *McCartan* v. *Belfast Harbour Commissioners*, reported in 44 Irish Law Times 223, also in [1911] 2 I.R. 143, in speaking of the value of such cases, the Lord Chancellor said (p. 145 of the latter report): " Decisions are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them . . . But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in the one must be adopted in the other also."

That case involved a similar question, namely, which of two alleged masters was liable for the negligence of the servant of one of them to another servant engaged in the same operation? The case had been tried by a jury, and the question is referred to by more than one of the learned Judges in the House of Lords as a pure question of fact involving no legal principle.

I am afraid I must plead guilty to having spent some time in the "unprofitable task" of seeking comfort and assurance from the judgments of other learned Judges in other cases of a somewhat similar nature, with the result that I am obliged to say, after looking at a great many of them, that in no case do I find the materi al

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facts to be of such a peculiar nature as in this case. In all of them there was what there is not here, namely, a voluntary hiring, in the ordinary sense, of the negligent servant by at least one of the alleged masters, and, therefore, no difficulty in determining whose general servant he was—the difficulty occurring later on when his services had been lent or bargained for temporarily to another. And the test usually applied was, who had the power to direct or control him in the doing of the act out of which the negligence arose? See *Waldock* v. *Winfield*, [1901] 2 K.B. 596; *Donovan* v. *Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629; *Brady* v. *Chicago and Great Western R.W. Co.* (1902), 114 Fed. Repr. 100; *Brow* v. *Boston and Albany R.R. Co.* (1892), 157 Mass. 399.

The initial difficulty here is to say that Leland was ever at any time, in any proper sense, the exclusive servant of the defendant the Canadian Northern Railway Company. That company, it is true, appointed him, but only under the compulsion of a statutory order. And it is also true that that company, in the first instance, paid his wages; but, in the end, they were really paid by the other company, at whose instance, and to serve whose purposes, the appointment was made. That company, it may fairly be said upon the facts, in the language of the definition of Best, C.J., was the company which expected to derive, and did derive, the chief advantage from his acts. He, in fact, did nothing for the other company but what had been rendered necessary by acceding to the request of the first-mentioned company. For months at a time the little spur-line of the defendant the Canadian Northern Railway Company was entirely closed, at which time, by the terms of the order, the signals and derails were so set as to admit of the trains of the other company passing without stopping, and the services of a signalman then wholly dispensed with.

Having regard to all the circumstances, I see no difficulty in construing the order under which Leland was appointed as providing, and intended to provide, for the case of a signalman who should be in charge of the crossing and should be in the service of the two companies, acting for each upon its own lines as the occasion required; and in holding that, on the occasion in question, Leland, the signalman in charge, was a person in the service of the defendant the Canadian Pacific Railway Company as employer, who had charge or control of the points and signals at the crossing in question, within the meaning of sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act.

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Such a construction violates no rule of law, in my opinion, and is in entire accordance with the justice of the case.

I would dismiss the appeal with costs.

Appeal allowed; GARROW, J.A., *dissenting.*

NOTE.

The Supreme Court on April 14, 1913, dismissed an appeal of the Canadian Northern Ry. Co., from the judgment of the Court of Appeal without calling on the respondents.

INTERCHANGE OF TRAFFIC.

IN RE CITY OF TORONTO AND TORONTO RY. CO.

(26 O.L.R. 225.)

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. April 15, 1912.

1. CARRIERS (§ IV B—521)—GOVERNMENTAL CONTROL—COMPULSORY CONNECTION AND INTERCHANGE OF BUSINESS—ONT. RAILWAY ACT, 6 EDW. VII. (ONT.) CH. 30, SEC. 57, SUB-SEC. 4.

Sub-section 4 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, applies only to railways actually in existence and operation at the time of the application to the Ontario Railway and Municipal Board thereby provided for, and there is no difference in this respect when the railways in question, or any of them, are street railways.

2. CARRIERS (§ IV A—519)—GOVERNMENTAL CONTROL—ORDERS OF THE RAILWAY AND MUNICIPAL BOARD—JURISDICTION—6 EDW. VII. (ONT.) CH. 30, SEC. 57, SUB-SEC. 6.

Where under sub-section 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Railway and Municipal Board makes an order declaring that section 57 shall apply to two railways, as to one of which it has jurisdiction to make such an order, but not as to the other, the intention being to bring about an interchange of traffic between them, the Court of Appeal will not strike out that part of the order which is beyond the Board's jurisdiction and let the remainder stand, when the effect of so doing would be to name a different order from that which the Board intended to make, and, in fact, made.

3. CARRIERS (§ IV A—519)—POWER OF ONTARIO RAILWAY AND MUNICIPAL BOARD—6 EDW. VII. CH. 30, SEC. 57.

Upon the proper construction of sub-section 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Ontario Railway and Municipal Board has power only to declare that that section shall apply to a particular railway, without any limitation as to the rail-

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ways with which such railway may thereby become liable to interchange traffic, but such a declaration does not restrict the power of the Board to refuse subsequently to order an interchange of traffic between such railway and any other railway, or to impose such terms of interchange as it may see fit. (*Per* Magee, J.A.; Meredith, J.A., *contra*.)

4. CARRIERS (§ IV B—521)—GOVERNMENTAL CONTROL—COMPULSORY INTERCHANGE OF BUSINESS—MUNICIPAL OWNED RAILWAY—6 EDW. VII. (ONT.) CH. 30, SEC. 57.

Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, does not apply to a railway owned by a municipal corporation. (*Per* Magee, J.A.)

BY an order made by the Court of Appeal on the 17th November, 1911, the Toronto Railway Company were allowed to appeal to that Court from an order made by the Ontario Railway and Municipal Board on the 24th June, 1911.

The order of the Board was made upon the application of the Corporation of the City of Toronto, which application was as follows:—

"The applicant hereby makes application for an order of the Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent.

"And for an order that the respondent company and its railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906."

The order made by the Board was as follows:—

"1. This Board determines, orders, and declares that section 57 of the Ontario Railway Act, 1906, shall apply to the

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Toronto Railway Company and the street railways owned and operated by the said company.

"2. This Board further determines, orders, and declares that section 57 of the Ontario Railway Act, 1906, shall apply to the Corporation of the City of Toronto and the street railways to be constructed by it."

Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, is as follows:—

57.—(1) The directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in this Province or elsewhere, for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and appointment of tolls, rates and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect such agreement or arrangement, with such powers and functions as may be considered necessary or expedient, subject to the consent of two-thirds of the shareholders, voting in person or by proxy.

(2) Every railway company shall, according to their respective powers, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles; and no such company shall give or continue any preference or advantage to or in favour of any particular company, or any particular description of traffic, in any respect whatsoever, nor shall such company subject any particular company or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever; and every railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway or which has a terminus, station or wharf of the one near a terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by the one of such railways, all the traffic arriving by the other, without any unreasonable delay and without any such preference or

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advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered in the using of such railway as a continuous line of communication, and so that all reasonable accommodation may at all times, by the means aforesaid, be mutually afforded by and to the said several railway companies.

(3) If any officer, servant or agent of a railway company, having the superintendence of the traffic at any station or depot thereof, refuses or neglects to receive, convey or deliver at any station or depot of the company for which they may be destined, any passenger, goods or things, brought, conveyed or delivered to him or to such company, for conveyance over or along the railway from that of any other company, intersecting or coming near to such first-mentioned railway, or in any way wilfully contravenes the provisions of the next preceding sub-section—such first-mentioned railway company, or such officer, servant or agent, personally, shall, for every such neglect or refusal, incur a penalty not exceeding $50 over and above the actual damages sustained.

(4) In case any company or municipality interested is unable to agree as to the regulation and interchange of traffic or in respect of any other matter in this section provided for, the same shall be determined by the Board.

(5) All complaints made under this section shall be heard and determined by the Board.

(6) This section shall apply to such street railways as may from time to time be determined by the Board.

H. S. Osler, K.C., for the appellants, argued that the Board had no power under sec. 57 (6) of the Ontario Railway Act to make the order in question. The language of the Act could only refer to railways in existence, and was not intended to enable a corporation desirous of building a railway to ascertain in advance the terms upon which it could interchange traffic with an existing railway. The statute shews that the Board must have all the facts before it before making such an order, and the necessary evidence has not been obtained in the present case.

H. L. Drayton, K.C., and *G. A. Urquhart*, for the respondents, argued that the question at issue was merely an academic one, as the city's railways would soon be finished. The jurisdiction of the Board to make the order appealed against is plain under sec. 57 (6) of the Act, and the appellants are not entitled to rely on the absence of evidence which they could have supplied at the hearing, if they had desired to do so.

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Osler, in reply, argued that the question was not merely academic; and, even if it were, the statute should not be construed in the way suggested by the respondents, in the absence of clear and specific words to the effect contended for.

The appeal was allowed.

April 15, 1912. Moss, C.J.O.:—In the view which I take of the question raised by this appeal, it is not necessary to discuss or consider at length many of the arguments which were forcibly presented against and in support of the order appealed from.

As a practical operative order, it works no substantial advantage to the city and it imposes no real disadvantage upon the company. It settles nothing of a practical nature, and, as a declaratory order, does nothing towards making effective the provisions of sec. 57 of the Ontario Railway Act, 6 Edw. VII. ch. 30, as between the parties hereto.

Whether, if the Board had the power to issue the order, it rightly exercised it, is a question with which we have no concern. It is right to assume that, when its power to determine is invoked, the Board will not undertake to determine without having first informed itself of all the existing conditions, and considered whether the circumstances shewn make it just and proper to put the provisions of the section into effect as between the street railways then before it.

The question of power turns, as it appears to me, upon the proper view to be taken of sub-sec. (6) of sec. 57 of the Railway Act, read, of course, in connection with and in the light of the other portions of the section.

I am unable to satisfy myself that in this case the circumstances had arisen which, upon a careful study of the section, I think must occur before the power under sub-sec. (6) is called into action.

It is, of course, undeniable that primarily the provisions of the section deal only with steam railways, and are intended to govern the regulation and interchange of traffic between transportation agencies of that character. And it is also quite plain that the legislation contemplates existing operating companies actually engaged in carrying traffic, which includes, no doubt, passengers, as well as goods. Thus sub-sec. (1), providing for agreements between companies, speaks of "traffic passing to and from the railways of the said companies," of "the working of the traffic over the said railways," of "the division and appor-

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tionment of tolls, rates and charges in respect of such traffic," and of "the appointment of a joint committee or committees for the better carrying into effect such agreement." So, too, sub-sec. (2), imposing upon a company an obligation to afford facilities to other companies, speaks of "the receiving and forwarding and delivering of traffic," of "the return of carriages, trucks, and other vehicles," of a company "having or working a railway which forms part of a continuous line of railway, or which intersects any other railway," of the duty of such a company to "afford all due and reasonable facilities for receiving and forwarding by the one of such railways, all the traffic arriving by the other." Again, sub-sec. (3), dealing with penalties, speaks of refusal or neglect "to receive, convey or deliver at any station or depot of the company for which they may be destined, any passenger, goods or things, brought, conveyed or delivered . . . . for conveyance over or along the railway from that of any other company, intersecting or coming near to such first-mentioned railway."

All these point plainly and unmistakably, not to projected or contemplated railways, but to railways actively engaged in the business of conveying passengers and goods upon and over their lines. It is only when they are found in that condition that they can be usefully rendered available for carrying out the objects aimed at.

Sub-section (4) brings the Board into requisition where there is a failure or inability to agree as to the regulation and interchange of traffic or any other of the matters provided for, and empowers it to determine upon an agreement according to the terms of which the mutual services prescribed by the previous portions of the section shall be performed by the parties interested.

But, before the Board's powers can come into play, it must find, and be prepared to deal with, a case of (a) at least two existing operating companies engaged in receiving, forwarding, and delivering traffic with railways forming parts of a continuous line or intersecting each other or having termini, stations, or wharves near to each other; in fine, operating and carrying on the business of transportation of passengers or freight or both under the circumstances detailed in the preceding portion of the section; and (b) inability to agree as to the regulation and interchange of traffic or in respect to the other matters provided for.

Now, is there anything in sub-sec. (6) to shew that in the case of street railways there is to be any different mode of treating the matter?

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It says "this section," that is, the preceding provisions of the section, "shall apply to such street railways as may from time to time be determined by the Board." Is it intended by this enactment to do more than to apply the provisions of the section to street railways which the Board shall find holding towards each other, relatively at least, the same position as steam railways? That it was not so intended seems to be manifest from the language. Under sub-sec. (4) the powers of the Board arise only when there has been inability to agree upon the matters there specified. And these powers are confined to determining in respect of these matters. Sub-section (6) enables the Board to deal with street railways, but does not say that it is to do so under circumstances different from those under which they deal with steam railways, by virtue of sub-sec. (4). In other words, the Board, when it finds two or more existing operating street railways before it, upon application made by one or more of the parties interested, is to determine whether, as regards the street railways before it, there is a case proper for intervention under sub-sec. (4). It may be that the Board should have regard, upon such an application, to the differences in methods of transport and the conduct of business between the two systems; but there does not appear to be any warrant for such a wide departure from the manifest object and scope of the section as to adapt it to a case where there are not two existing and operating lines before the Board upon the application.

The application is intended to result in something practical in the form of an order determining the terms and conditions upon which the regulation or interchange of traffic is to take place. There is no indication anywhere that the Board is to deal with any but a state of circumstances outlined in sub-sec. (4).

For these reasons, I think that, under the then existing circumstances, the order made was not within the scope of the Board's powers under sec. 57, and that it should not stand.

The appeal should be allowed, with the usual result as to costs.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—The main part of the respondents' application to the Board makes manifest its premature character; it is in these words:—

"The applicant hereby makes application for an order of the

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Ontario Railway and Municipal Board, directing and ordering the respondent to afford all proper and reasonable facilities for the receiving and forwarding of passenger traffic upon and from the several railways belonging to the respondent, and those to be constructed by the applicant upon St. Clair avenue and Gerrard street, in the city of Toronto; and providing for the return of cars, motors, and other equipment belonging to either the applicant or the respondent, and used for the purpose of receiving or forwarding such traffic, so as to afford all passengers on the cars of the municipal system passage over the tracks of the respondent company as a continuous line of communication without unreasonable delay and without prejudice or disadvantage in any respect whatsoever, and so that no obstruction may be offered in the use of the Toronto Railway system and lines to be laid by the applicant as a continuous line of communication, and so that all reasonable accommodation may at all times be mutually afforded by and to the said applicant and the said respondent."

To an ordinary mind it must seem extraordinary, at the least, for any one to apply for an interchange of passenger traffic, cars, motors, and other equipment, not only without having any to interchange, but without having even a railway to run them over; indeed, so extraordinary that, although the Board was plainly anxious to aid the applicant all it could, this part of the application is not even adverted to in the formal order made by it upon the application.

The earlier provisions of the enactment in question—the Railway Act, sec. 57—make it clear to me, upon their face, that they relate only to existing railways. The agreement which railway companies may make is for the "interchange of traffic passing to and from the railways" of such companies: evidently existing railways capable of actually making such an interchange; and in practice almost necessarily so. Then every railway company is to afford reasonable facilities to any other railway company for receiving, forwarding, and delivering traffic upon and from the several railways belonging to or worked by such railway companies respectively; again, existing railways, of course. And then a penalty is provided for refusal or neglect to forward traffic over, necessarily, an existing railway.

All this seems to be so plain, and so, for practical purposes, necessary, that there was little, if any, controversy over it: but it was urged, for the respondents, that, under sub-sec. (6) of sec. 57, the Board had power to determine that that section should apply to the appellants' railway: Mr. Drayton seemed

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to take refuge in this last ditch; but, for several reasons, in my opinion, he cannot hold it: in the first place, the order in question was not made upon the Board's own motion, but was based entirely upon the respondents' application, upon which they can take nothing and which they had no power to make; and, therefore, the order was made without jurisdiction: in the second place, the Board had no intention to make, and did not make, any such order; its order was intended to embrace, and does in terms embrace, both parties to the application and the railway of the one and the proposed railway of the other: to strike out that part of the order which relates to the respondents, and their proposed railway, and to let the rest stand, would be to make a new, and different, order, of a very different character and effect, from that intended to be made, and actually made, by the Board; and one which, I can hardly think, they would have thought of making; and which, if they had made it, could not, in my opinion, stand. The purpose of the Board was to make provision so that there should be an interchange of traffic between the railway of the appellants and that of the respondents, when it comes into existence; and that alone was the purpose of the application to them by the respondents. Take away the order against the respondents, and what remains is something never contemplated by the parties or the Board, and which, I should imagine, no one desires. It would give the prospective railway of the respondents nothing: they would be obliged to apply again to the Board when they have a real railway, not merely power to build it; whilst the effect upon the appellants and their railway would be this, that they would be bound to interchange traffic, including carriage trucks and other vehicles, with every "steam" railway under the legislative power of the Legislative Assembly; and also with any other street railway, municipal or otherwise, which the Board might see fit to bring into the provisions of sec. 57, or which is already within them, under sub-sec. (6); that is, of course, if the Board's power be as wide under that sub-section as the respondents contend for; but, lastly, its power under that sub-section is, in my opinion, much narrower than that, and does not extend to the making of an unlimited order of that character. Reading the whole section together, and having due regard to the purpose of the Legislature, gathered from the whole Act, sub-sec. (6) applies only to interchange between existing street railways: it does not authorise the making of an omnibus order against any street railway company, putting upon it an obligation to interchange

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with every sort of a railway under provincial legislative power. with the limitation only that, as to other street railways, an omnibus order shall be made respecting them. The very nature of the thing seems to me to require that the order shall be limited to two or more definite existing railways, to be made only after a consideration of the particular case in the public interests, as well as of the interests of the companies directly concerned. The respondents cannot want—indeed, it would be obviously against their interests to want—the appellants' railway thrown open to others and not to them: their need is, interchange between their railway when built and that of the appellants. but only if that can be beneficially accomplished; and they ought not, merely to save themselves from the position of having failed altogether in their application, to catch at and try to hold on to something that does them no good, but harm, as well as grievously and needlessly hampering the appellants' already overloaded railway. It is quite true that the applicants ought not to be delayed until the last spike of their construction is driven; but, on the other hand, it is at least equally plain that they ought not to begin their application before the first spike is driven; it can hardly be that even the first spike constitutes a "railway." The pitiful picture painted by the Chairman, of waste in the duplicating of works, is almost, if not altogether, a fanciful one only; and one which, if there really could be anything in it, would not be got rid of, or even ameliorated, by the order in question, which gives nothing to the respondents; until the final agreement, or order, for interchange, should be made, there would be just as much uncertainty as there is now; an uncertainty which cannot really affect materially, if in any way, the mode of construction of the proposed railway.

A much more real picture of that character might be drawn from a study of the effect of an unlimited order adding to the burden of already overcrowded cars, and overburdened rails, complaint, inconvenience, and bad feeling, as well as to the danger to life and limb which that burden already carries.

There is obviously a vast difference, in this respect, between "steam" railways and street railways; to the former, with their comparatively infrequent trains and the matter of merely attaching other cars to them, the freest interchange is, generally speaking, manifestly in the public interests, as well as in the interests of all else concerned; between street railways, with already overcrowded rails, as well as cars, cars which are run separately, and when it may be practically necessary to send not only the car

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but also the crews of the one company over the lines of the others, a very different, and a much more difficult, problem arises, and one which can be fairly dealt with only when the railways are in existence and after the most careful consideration of all the then existing circumstances—circumstances which are changing, in some respects, from time to time, and with especial regard to lessening rather than running any risk of increasing the already terrible toll of lost life and limb in street railway accidents.

I can have no manner of doubt that, if the position of the parties were reversed, if the municipality were the owners and operators of the central system, and some private corporation were projecting the outlying railway, this particular application would be generally scoffed at.

I am in favour of allowing the appeal, and discharging the order in question altogether.

MAGEE, J.A.:—The by-law and orders of the Ontario Railway and Municipal Board under which the City of Toronto Corporation is acting were not before us on the argument, but were before that Board, or at least within its cognizance upon the city corporation's application for the order now in appeal. A copy of by-law No. 5626, which will be referred to, has since been put in, and also a copy of the opinion of the Board, dated the 23rd June, 1911, approving of the plans and profiles submitted by the city as to car lines on Gerrard street and Coxwell avenue and on St. Clair avenue.

The appellants, the Toronto Railway Company, own and operate the street railway within what was formerly the city of Toronto, but new territory has since been added to the city, and the proposed street railways of the city or some of them are to be within the new territory.

As a municipal corporation, the city would be enabled under sec. 569 of the Consolidated Municipal Act, 1903 (as amended in 1906 by 6 Edw. VII. ch. 34, sec. 21, and in 1910 by 10 Edw. VII. ch. 81, sec. 4), to pass, with the assent of the electors, a by-law for building, equipping, maintaining, and operating street railways along such streets and subject to and upon such terms as the Lieutenant-Governor-in-Council might approve, and for leasing the same from time to time, and for levying an annual special rate to defray the interest and principal of the expenditure. No other statutory authority is referred to as empowering the city to construct or operate a street railway. By the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31,

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sec. 53, that Board is given the powers of the Lieutenant-Governor-in-Council as to approval or confirmation of such by-laws. By the Ontario Railway Amendment Act, 1910 (10 Edw. VII. ch. 81, sec. 3), a railway company shall not, without first obtaining the permission of the Board, begin the construction of a railway upon a highway, and this shall apply to a street railway; and by the Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), sec. 2 (21), a "street railway" is declared to mean a railway constructed or operated along a highway under or by virtue of an agreement with or by-law of a city or town. Thus the Board's approval of the by-law (or that of the Lieutenant-Governor-in-Council) would be necessary, and also the Board's permission, before beginning the construction on the streets.

A by-law was passed by the City Council with a view to the construction of some street railway lines. In the Board's reasons for the order, of the 24th June, 1911, now in appeal, it is stated that "the city submitted a by-law to the ratepayers to authorise the issue of debentures to the amount of $1,157,293, to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of this Board. The by-law was carried by an overwhelming majority." The Board then goes on to state: "On the 25th April last, the city made an application to the Board for the approval of the plans for the construction of the civic car lines on Gerrard street and Coxwell avenue from Greenwood avenue to Main street, and on St. Clair avenue from Yonge street to the Grand Trunk Railway crossing. The Board, in an opinion dated the 6th May, 1911, declined to approve the plans and profiles until the city furnished us with particulars of the whole scheme for building, equipping, maintaining, and operating the civic car lines. We stated in that opinion that we required to know all the streets the city intended to use for the lines, the mileage, the kind of rail, the character of the construction, kind of car barns and repair shops, the number and kind of cars to be operated, and an estimate of the cost of construction, operation, and maintenance, and of the revenue to be derived from the enterprise. The city have complied with this demand of the Board, and have furnished us with the required particulars and details of the scheme. The Board have approved of the plans and profiles and of the scheme generally. We are informed that the city have ordered the rails and other material necessary for the construction of the lines."

We find in the statutes of 1911 (1 Geo. V. ch. 119, sec. 8)

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that a city by-law No. 5626, passed on the 23rd January, 1911, for the raising of $1,157,293, the amount mentioned by the Board, was declared valid.

In the letter of the 5th May, 1911, to the company's manager, counsel for the city stated: "As you know, the different routes under contemplation by the city, and for which the by-law has been passed by the people, are as follows: (1) St. Clair avenue . . . (2) Davenport road and Bathurst street . . . (3) Rosedale loop . . . (4) Danforth avenue . . . (5) Gerrard and Main street. . . ." The letter goes on to state the estimated cost of constructing a double track with an 80-lb. rail on each of these routes.

So far as appears, by-law No. 5626 is the only by-law passed. It recites that by a report of the Board of Control, adopted in council, "it is recommended that a by-law should be passed to provide for the issue of debentures to the amount of $1,157,293 for the purpose of building and equipping street railways, and of laying permanent pavements upon the railway portions upon certain streets of the city;" and that the council had determined to issue debentures to that amount, "for the purpose of raising the amount required to pay for the construction and equipment of street railways upon certain streets to be selected by the council, with the approval of the Ontario Railway and Municipal Board, in those parts of the city annexed thereto since September, 1891, and for the laying down of permanent pavements upon the railway portions of such streets." The by-law then authorised the issue and sale of the debentures, "and the proceeds thereof . . . shall be applied for the purposes above specified, and for no other purpose."

It would thus appear that the by-law does not specify any street for the railway, but leaves that to future selection by the council. The issue of debentures is made valid by the statute, and no objection is taken here as to the validity or sufficiency of the by-law otherwise, or to the right of the city to proceed with the construction and operation of the proposed lines. Objection is made, however, that the mere right to construct, and even an authorised plan for construction, does not suffice for the application now in question.

On the 5th June, 1911, the city gave the company notice of the application out of which this appeal arises, and the application was heard on the 21st June. No evidence was offered beyond putting in some letters which had passed between the parties, each inviting proposals from the other.

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The permission of the Board for the construction had not been given when the application was heard. The information which the Board had required was received by it only on the previous day, the 20th June, and the company's counsel was not aware that it had been furnished. The Board's approval is dated the 23rd June. The order appealed from, though not dated, is stated to have been made on the 24th June.

The city notified the company of its intention to apply to the Board for two things: an order to the company to afford all proper facilities for what may be called interchange of passenger traffic and cars between the company's street railway and two of the city's lines, namely, those on St. Clair avenue and Gerrard street; and an order that the company and their railway system shall be subject to and governed by the provisions of sec. 57 of the Ontario Railway Act, 1906. The Board did not grant the application for an order for interchange. It was hardly asked for, but recognised as premature, and indeed asserted by the city to be a matter for subsequent action. But the Board did make an order declaring that sec. 57 should apply to the company and its street railways, and also declaring that it should apply to the city corporation "and the street railways to be constructed by it." The latter declaration had not been specifically asked for.

The company appeal, on the ground that the Board had no jurisdiction to make such an order against them, at the instance of the city, or with a view to interchange with the non-existent city railways.

The Ontario Railway Act, 1906 (6 Edw. VII. ch. 30), in sec. 3, incorporates the Act with the special Act, and declares that it applies to "all persons, companies, railways (other than Government railways) and (when so expressed) to street railways within the legislative authority of the Legislature of Ontario;" but no section of the Act shall "apply to street railways unless it is so expressed and provided." Section 5 is to the like effect.

Section 57, in sub-sec. (1), provides that "the directors of any railway company may at any time, and from time to time, make and enter into any agreement or arrangement with any other company, either in this Province or elsewhere, for the regulation and interchange of traffic passing to and from the railways of the said companies, and for the working of the traffic over the said railways respectively, or for either of those objects . . . for any term not exceeding twenty-one years," and

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to "provide . . . for the appointment of a joint committee or committees for the better carrying into effect such agreement or arrangement . . . subject to the consent of two-thirds of the shareholders, voting in person or by proxy." Sub-section (2) provides that "every railway company shall . . . afford all reasonable facilities to any other railway company for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles;" and no such company is to give any preference or advantage to any particular company or description of traffic, or subject any to prejudice or disadvantage; and "every railway company having or working a railway which forms part of a continuous line of railway, or which intersects any other railway or which has a terminus, station or wharf of the one near a terminus, station or wharf of the other," shall afford facilities for receiving and forwarding by the one all the traffic arriving by the other and so that no obstruction may be offered "in the using of such railway as a continuous line of communication." Sub-section (3) imposes penalties on the employees of a "railway company" refusing or neglecting to receive, convey, or deliver traffic from the railway of "any other company." Sub-section (4) declares that "in case any company or municipality interested is unable to agree as to the regulation and interchange of traffic or in respect of any other matter in this section provided for, the same shall be determined by the Board." And sub-sec. (5) reads: "All complaints made under this section shall be heard and determined by the Board." If the section stopped there, it would not apply to street railways. But sub-sec. (6) is added, which declares that "this section shall apply to such street railways as may from time to time be determined by the Board."

The word "company," in the expressions "any railway company," "every railway company," and "any other railway company," used in sec. 57, is not, I think, governed by the interpretation given in sec. 2 to the expression "the company," and should, therefore, be interpreted in its natural sense, and would not include a municipal corporation. And, as only companies are mentioned, it could not be intended that municipalities or their railways could be made subject to it. But then, it may be said, that, under sec. 569 of the Municipal Act, the municipality has the same rights, powers, and liabilities as street railways and companies (which must mean all, not some, of such railways and companies) under the Street Railway Act (R.S.O.

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1897, ch. 208), which is now replaced and repealed by the Ontario Railway Act, 1906. By the Interpretation Act, R.S.O. 1897, ch. 1, sec. 8 (now 7 Edw. VII. ch. 2, sec. 7), the sections of the Ontario Railway Act, 1906, corresponding to those of the Street Railway Act, would be applicable. In the Street Railway Act and the amendments before 1906, there was no provision requiring interchange, though there was a right to agree to interchange. Section 57, apart from sub-sec. (6), does not relate to street railways at all, and even with sub-sec. (6) does not relate to all but only to some street railways—perhaps to none in the Province other than these two. It cannot then be said that sec. 569 makes interchange a right or liability of the municipality. The only view in which it might be claimed that the municipality would be made subject to sec. 57 is, that it is subject to the jurisdiction of the Board, and liable to have an order made by the Board under that section—but that is not, I think, in any sense, one of the "liabilities" contemplated by sec. 569. I am, therefore, of opinion that a municipality is not liable under sec. 57, any more than a Government railway, to be compelled to interchange traffic with any street railway or other railway company. I may here add that the use of the word "municipality" in sub-sec. (4) does not help a contrary view; it is manifestly used in respect of rights other than as proprietors of a railway, and its use there, as contradistinguished from "company," when it is not used elsewhere in the section, rather supports the view that "company" does not include "municipality."

It is noticeable that sub-sec. (6) of sec. 57 uses the words "street railways." "Street railway" is defined in sec. 2 (21) as meaning a railway "constructed or operated" along a highway, as already mentioned. Had sub-sec. (6) used the words "the company," they are defined as meaning "the company or person" (which would, under the Interpretation Act, include "corporation") "authorised by the special Act to construct." The city's street railway is authorised, but it is not yet commenced, much less constructed or operated. But, as the interchange of traffic could not take place till constructed and operated, I do not see that the Board must wait until that stage before making the declaration that sec. 57 shall apply to it, when constructed and operated. As pithily put by the Board, "that the proposed civic lines will be built is as certain as taxes." The Board do not make such a declaration in the dark. As appears from the quotation above made from their reasons, they know the routes and the gauge, and sufficient particulars to enable them to judge whether it is

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proper that a particular street railway should be made liable to interchange at all. The Legislature has constituted the Board for the very purpose of exercising its discretion, and it is not to be assumed that the Board would in any case act in the dark or without full information on all points necessary for arriving at a decision. The liability to interchange is one thing, the terms of the interchange another.

I have been dealing with the question of the power of the Board to determine that the city or its street railway shall be subject to sec. 57. That it has such power with regard to the street railway of the appellant company is not disputed. That power it may exercise of its own motion or on the application of any one interested, and, under sec. 17 of the Ontario Railway and Municipal Board Act, it can decide conclusively who is a party interested; and I do not see anything in the Act to prevent the city corporation, owning or not owning a street railway, or a Board of Trade, or a body of merchants, or an individual, from being considered by the Board to be a party interested sufficiently to set the Board in motion if the Board did not choose to take action itself.

We then come to consider the order appealed from. It is in fact two orders combined in one. It is not an order that sec. 57 shall apply as between these two street railways, or shall apply to each as regards the other. It contains an absolute and unlimited declaration that the section shall apply to the company and its street railway. And then it contains an equally absolute and unlimited declaration as to the city and the "street railways to be constructed by it." It is not restricted to those conterminous with the company's railway nor to those on St. Clair avenue and Gerrard street, nor even to those to be constructed under the existing by-law; but this appeal has no concern with any objection on that score. The effect is that, if sec. 57 is to apply to the company, it applies to it not merely to require interchange with the city's street railway, but with all street railways, if not all railways of any sort to which sec. 57 from time to time applies.

That brings us again to consider sub-sec. 6. Several meanings may be put forward for it. One is that the Board may apply sec. 75 not to one or more specified street railways, but to a class or to such as answer certain requirements. This order would not comply with that interpretation. Another meaning might be argued for—that the Board could apply sec. 57 not to any one or

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more certain specified street railways, but only as between two or more specified street railways—so that, in fact, it would not wholly apply to any one of them—that is, it would not apply to it as regards railways not mentioned. This order does not comply with that meaning.

Then the only remaining construction, and the one which is, in my opinion, the correct one, is, that the Board may do what, if we could judge only by the formal order, it has done here, that is, decide whether or not sec. 57 shall apply to a particular railway, whatever the result may be.

If the Board chooses to do that with regard to the street railway of the appellant company, or any other company to which the Ontario Railway Act applies, I do not see anything to prevent it. What the effect upon that company may be is another question. Does it become liable to interchange with all railways which are subject to sec. 57, or only with street railways? The section is to be construed not merely with reference to Toronto alone, but with reference to the whole Province. There might well be places in which a street railway would be the only connecting link between two lines of steam railways, and in which it might be constructed with a view to being a connecting link, as street railways are not limited to carriage of passengers, and street railways continue to be street railways for a mile and a half outside the city or town. It might be to the public interest that such a street railway should be both entitled and liable to interchange with lines of steam railway.

In my opinion, the Board cannot limit the application of sec. 57, if it declares that that section applies to the appellant street railway or any other. It cannot say how far that section shall apply, or that it shall apply only to a limited extent, or with regard to one railway or one street railway.

If two companies to which the section applies are subsequently unable to agree, and the intervention of the Board becomes necessary, it may find interchange impracticable, and decline to make an order between them, or may have to require conditions which would not be acceptable to an applicant. But that is a different matter from assuming to exercise, under sub-sec. (6), the right to limit the application of the section.

Although the order appealed from, in form, purports to be separate applications of sec. 57 to each of these street railways, it is not stated just what view the members of the Board took of the meaning of the sub-section. But in their reasons they in

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every instance couple the two roads together. For instance, it is stated: "The application is made by the city against the Toronto Railway Company for the purpose of securing an interchange of traffic between the civic car lines and the company's street railway system, and with that view to have it declared that sec. 57 of the Ontario Railway Act of 1906 applies to the company and the city street railway . . . We do not think we require to wait until the last spike is driven before determining that sec. 57 . . . shall apply to the city's and the company's street railways. To do so would result in useless and wasteful duplication . . . There should be an interchange of traffic; and, therefore, we make the determination asked for by the city." The Board also expressed its opinion that it would be in the public interest, when the city had completed and equipped the railway, to arrange for its operation with the present street railway as one system. Nowhere does the Board deal with the propriety of making sec. 57 applicable to any one road alone.

It is, I think, evident that, although the city had only asked for the application of sec. 57 to the company's street railway, the Board was not considering the application of the section to either railway apart from the other—and was making the declaration only with respect to the company's railway, because it was also making a similar declaration with regard to the city's railway. The reasons of the Board for its decision are signed by all the members, and are before this Court, and it is evident that, if the city was not to be liable to interchange, no order would have been made in respect of the company alone, and that the order was only made for the purpose of interchange between these two railways. Taking, as I do, the view that the Board could not apply sec. 57 to the city railways, it follows, I think, that, although the order with respect to the company's railways would, if it stood alone, be quite within the powers of the Board, yet, being made upon a non-existent basis, and with a view to an impossible result, and made without consideration of its effect upon the company with regard to any other railway or street railway, it was not warranted in law and should be declared invalid.

Whether, in view of the provisions of sec. 21 of the Ontario Railway and Municipal Board Act, 1906 (6 Edw. VII. ch. 31), restricting the Board's power to interfere with a company's rights or duties under an agreement, any practical beneficial

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result would be attained by the application of sec. 57 of the Ontario Railway Act, may give rise to serious consideration. The Board have a very desirable end in view, and it is to be hoped that the good sense and public spirit of both parties will lead them to it.

Appeal allowed.

CARRIERS—LIMITATION OF LIABILITY.

ROBINSON v. GRAND TRUNK RY. CO.

(26 O.L.R. 437.)

Ontario High Court. Trial before Latchford, J. June 6, 1912.

1. CARRIERS (§ III G—441)—LIABILITY OF RAILWAY TO CARETAKER OF STOCK—REDUCED FARE—NO PRIVITY BETWEEN CARETAKER AND RAILWAY—EXEMPTION FROM LIABILITY.

One travelling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, is not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which he derived no benefit.

[*Goldstein* v. *Canadian Pacific R. Co.*, 23 O.L.R. 536, specially referred to.]

ACTION for damages for injury sustained by the plaintiff by reason of the defendants' negligence, in the circumstances mentioned below.

Judgment was given for the plaintiff with costs.

W. L. Haight, for the plaintiff.
D. L. McCarthy, K.C., and *W. E. Foster,* for the defendants.

June 6, 1912. LATCHFORD, J.:—That the defendants caused injury to the plaintiff by their negligence was formally admitted at the trial, where the damages which the plaintiff thus sustained were fixed by a jury at $3,000.

It is, however, contended on behalf of the defendants that they are relieved from liability by the terms of a contract made between them and one Dr. Parker, who shipped a horse in charge of the plaintiff from Milverton, in the county of Perth, to South River, in the district of Parry Sound. Dr. Parker had purchased the horse for his friend, Dr. McCombe, of South

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River; and, at the latter's request, the plaintiff proceeded to Milverton to bring up the horse; the rules of the defendants requiring that live stock shipped more than a hundred miles should have a man in charge.

The plaintiff accompanied Dr. Parker to the railway station, and was present when the shipping bill and special contract upon which the defendants rely was signed by the defendants' agent and by Dr. Parker, who thereupon, at the instance of the agent, handed it, folded, to the plaintiff. In the margin of the contract is written, "Pass man in charge at half fare." The plaintiff did not open or read the contract. Its purport was not made known to him by any one, nor was he required by the agent (as the form directs) to write his name upon it. He paid no fare, and was asked for none. Half fare for him was, however charged in the bill rendered to Dr. McCombe at South River for the carriage of the horse, and both charges were paid by Dr. McCombe. During the transit, a rear-end collision negligently occurred at Burk's Falls, and the plaintiff sustained serious injury.

The contract under which the horse was carried was before the Board of Railway Commissioners of Canada for approval, on the 17th October, 1904, upon the application of the three great railway systems of the Dominion and of the Pere Marquette Railroad Company. An order was thereupon made, which, after referring to the matter as one of great importance, "requiring that much circumspection should be exercised in examining into the forms which the Board hereafter has to approve and also into the question of limitation of liability on the part of the carriers," empowered and authorised the applicants to use the forms submitted "until the Board shall hereafter otherwise order and determine."

The form signed by Dr. Parker is identical with that then temporarily authorised by the Railway Commissioners; and, though nearly eight years have elapsed, no further or other order has been made in a matter so seriously affecting the relations between the principal railways of the country and the shippers of live stock. The important provision is as follows:—

"In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while

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in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees, or otherwise howsoever."

In view of the decisions of *Bicknell* v. *Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and *Sutherland* v. *Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, it cannot be doubted that the contract was binding upon Dr. Parker. That point, however, is not involved in the present case. Here the question is this: Is the plaintiff bound by a contract made between the shipper and the carrier to which the plaintiff was not a party and of the terms of which he had no knowledge? I have been referred to no case which decides this affirmatively.

In *Goldstein* v. *Canadian Pacific R.W. Co.* and *Robinson* v. *Canadian Pacific R.W. Co* (1911), 23 O.L.R. 536, the carriers appear to have recognised their liability for negligence causing damage to persons accompanying live stock under a contract identical with that made between Dr. Parker and the defendants. The contract bore the same "note" as here; and in both cases, as here, the men accompanying the stock were not required to sign or endorse the contract. Unlike the present case, the relation of master and servant—if that is at all material—existed between the shippers and the men accompanying the stock. The question before the Court for decision was the right of the carrier to recover from the shippers the amounts paid by the railway company to Robinson, who was injured, and to the personal representatives of Goldstein, who was killed. Garrow, J.A., in his judgment (p. 540) says: "No trial having taken place, it is now quite impossible accurately to ascertain what the defendants feared, or exactly why they settled; the only really material fact appearing, so far as the third parties (the shippers) are concerned, being that, before doing so, the defendants took the precaution of obtaining from them the undertaking not to dispute the liability of the defendants to the plaintiffs, or the amounts at which it was proposed to settle." The learned Judge then proceeds to say that the question before the Court was merely the right of the defendants to indemnity for the amounts so paid; and, applying the rule that generally the right to indemnity, unless expressly contracted for, must be based upon a previous request, express or implied, to do the act in respect of which indemnity is claimed, the learned Judge

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held that, in the circumstances, there was no express covenant or contract of indemnity, and that it would be impossible in law to imply one. The case against the third parties was, therefore, dismissed.

In my opinion, I am not bound by the opinions expressed by Meredith, J.A., in his judgment (pp. 542 and 543) as to the right or absence of right on the part of those injured by the carriers, arising out of the contract made between the shippers and the railway company. These opinions are, I think, mere *dicta,* not necessary to the determination of the question of indemnity which was before the Court.

I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide.

I direct that judgment be entered for the plaintiff for $3,000 and costs.

Judgment for plaintiff.

See next case.

ROBINSON v. GRAND TRUNK RY. CO.

(27 O.L.R. 290.)

Ontario Court of Appeal, Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J. November 19, 1912.

1. CARRIERS (§ III G—441)—LIABILITY OF RAILWAY CO. TO CARETAKER OF STOCK—REDUCED FARE—EXEMPTION FROM LIABILITY.

One who travels upon a railway in charge of live stock, at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train at all, cannot be heard to deny that he is travelling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company.

[Dicta in *Goldstein* v. *C.P.R.*, 23 O.L.R. 536, followed; *Robinson* v. *Grand Trunk Ry. Co.*, *ante*, p. 441, reversed.]

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2. CARRIERS (§ IV—519)—GOVERNMENTAL CONTROL—POWER OF BOARD OF RAILWAY COMMISSIONERS—AUTHORIZATION OF CONTRACT EXEMPTING RAILWAY COMPANY FROM LIABILITY.

It is within the power of the Railway Board under the provisions of the Railway Act, R.S.C. ch. 37, to authorize a contract relieving the company from liability to one travelling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise.

APPEAL by the defendants from the judgment of Latchford, J., *Robinson* v. *Grand Trunk Ry. Co.*, *ante*, p. 441, 26 O.L.R. 437, in favour of the plaintiff, holding the defendants liable for damages for injuries sustained by the plaintiff, while travelling at a reduced fare upon a train of the defendants, owing to negligence of the defendants, notwithstanding the terms of a contract purporting to exempt the defendants from liability.

The appeal was allowed, MAGEE, J.A., and LENNOX, J., dissenting.

D. L. McCarthy, K.C., for the defendants, argued that the plaintiff was either travelling under the contract, in which case he was bound by its terms; or he was a trespasser, in which case the defendants owed him no duty, except not to injure him wilfully, of which there was no suggestion. He referred to *Goldstein* v. *Canadian Pacific R.W. Co.* and *Robinson* v. *Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536; *Heller* v. *Grand Trunk R.W. Co.*, 5 D.L.R. 114, 25 O.L.R. 488; the Railway Act, R.S.C. 1906, ch. 37, sec. 284, sub-sec. 7; Elliott on Railroads, 2nd ed., vol. 3, p. 905, citing *Boering* v. *Chesapeake Beach R.W. Co.* (1904), 193 U.S. 442, a case almost identical with the case at bar.

R. McKay, K.C., for the plaintiff, argued that the contract was not binding on the plaintiff, not having been signed or assented to by him, or brought to his notice. The action is founded on tort, not on contract, and on the authorities the plaintiff is entitled to recover. The cases are collected in *Jennings* v. *Grand Trunk R.W. Co.* (1887), 15 A.R. 477, at p. 484. Reference was made to *Marshall* v. *York, &c., R.W. Co.* (1851), 11 C.B. 655, 662, 663; *Richardson Spence & Co.* v. *Rowntree*, [1894] A.C. 217; *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. App. 470; *Bate* v. *Canadian Pacific R.W. Co.* (1889), 18 Can. S.C.R. 697; *Parker* v. *South Eastern R.W. Co.* (1877), 2 C.P.D. 416. The obtaining of the plaintiff's signature to the contract was a material step, and the failure to do so made

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it of no effect, as far as he was concerned. The provision of the Railway Act, sec. 340, under which the Board may determine the extent to which the liability of the company may be "impaired", does not extend to relieving the company from liability altogether (*Heller* v. *G. T. R.*, 5 D.L.R. 114), and sec. 284 remains good. *Sutherland* v. *Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, was also referred to.

McCarthy, in reply, referred to *Bicknell* v. *Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and to *Taylor v. Grand Trunk R.W. Co.* (1902), 4 O.L.R. 357.

November 19, 1912. GARROW, J.A.:—The action was brought by the plaintiff to recover from the defendants damages caused to the plaintiff while upon a railway train on the defendants' line of railway. The injury was caused by a collision with another train; and negligence in operating the train is admitted. The jury assessed the damages at $3,000.

The only question upon this appeal arises out of the circumstances under which the plaintiff was upon the train at the time of the injury complained of, which are very similar to those recently before this Court in *Goldstein* v. *Canadian Pacific R.W. Co.*, 23 O.L.R. 536, even to the circumstance that the blank for the signature of the person travelling with the animal had here, as there, been left unsigned. There is, however, this circumstance which should be mentioned; in the *Goldstein* case it did not appear that any fare was paid or intended to be paid by the shipper for the carriage of the attendant; while in this case a reduced fare was charged and paid by the consignee.

The view of Latchford, J., is thus expressed: "I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide."

In the *Goldstein* case, the main question was as to the right of

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indemnity which the defendants claimed against the third parties. And in considering that question I incidentally referred to the nature of the contract under which the plaintiff was travelling at the time of his injury, and indicated my opinion of its proper construction as far as the then plaintiff was concerned: see 23 O.L.R. at p. 539.

Further consideration in this case, in which the question is, of course, more directly involved, has only served to confirm what I there expressed, that a person in the position of the plaintiff, travelling under such special circumstances, paying no fare himself, and having no other ticket or other authorisation entitling him to be upon the train at all, cannot be heard to deny that he was travelling under the provisions of the contract in his possession, whether he had taken the trouble to read it or not. And the result would, in my opinion, be the same whether or not the signature of such person upon the back of the contract, in the blank for that purpose, had been obtained. Such signature is clearly not essential to the creation of the contract, its only use being obviously for the purpose of identification and to prevent any one else from travelling upon it.

I am not quite certain what is meant in the judgment by the "common law rights" of the plaintiff, to which the learned Judge thought he might be remitted. He cannot, of course, have meant a common law right to travel free, or at a reduced fare, upon the defendants' railway; for, of course, no such right exists or ever existed. The only other common law right which occurs to me is the ordinary right of every one to be protected against negligence. But negligence in such connection does not mean abstract negligence, but negligence under circumstances which imposed upon the negligent one a duty not to be negligent. And the nature and extent of this duty is not a fixed and definite quantity applicable to all alike, but varies according to the circumstances. For instance, a passenger who has paid his fare and has a ticket is legally entitled to assert a higher and more extensive duty in his case than has a mere trespasser, who has paid no fare and has no contract. So that the fundamental inquiry into the nature and extent of the duty does not stop short at the point where the plaintiff is merely found to have been upon the defendants' train, but must involve and include the further question of how and by what authority he came to be there, with the inevitable result, as it seems to me, that the contract is thus reached, and must be received and acknowledged as the foundation and the measure of the rights, duties, and liabilities of all parties, the plaintiff included. The

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shipper, under such a contract as the one in question, may himself accompany the animals, or he may name a person to do so, who becomes, in the language of the contract, his "nominee." No one accompanying the animals is apparently compelled to accept the privilege of travelling under such a special contract at reduced fare, or no fare at all. Instead it is quite open to the person to purchase in the ordinary way the regular ticket, paying the regular fare, in which case he would be entitled to the rights of an ordinary passenger.

But, if the travelling is done under special contract, and at the reduced fare, or no fare, as the case may be, its terms must, I think, be equally binding upon the shipper, if he alone accompanies the animals, or upon his nominee, if he does not.

And, as the contract in question clearly excludes liability on the part of the defendants for the death, injury or damage, whether "caused by the negligence of the company or its servants or employees, or otherwise howsoever", and has been duly authorised by the Railway Board, under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37, the only remaining question must be the important one whether the Board has authority in the premises.

And that question I would answer in the affirmative.

The language of the section is:—

"No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have first been authorised or approved by order or regulation of the Board.

"(2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

"(3) The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company."

"Traffic" is interpreted to mean "the traffic of passengers, goods and rolling stock:" sec. 2 (3). And "goods," by clause (10) of the same section, as "personal property of every description that may be conveyed upon the railway, or upon steam vessels, or other vessels connected with the railway."

Section 284, which I need not quote at length, should also be looked at. It prescribes for "accommodation for traffic," and,

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among other things, for "with due care and diligence" receiving, carrying and delivering traffic. And sub-sec. 7 gives to "every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section," *but "subject to this Act,"* "an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant." The omission from this sub-section of the word "contract" should also be noted, a word found in sec. 340 in connection with the other words here used—with the additional words, "by-law, regulation."

In the well-known *Vogel* case, *Grand Trunk R.W. Co.* v. *Vogel* (1886), 11 Can. S.C.R. 612, two of the learned Judges, Strong, J., and Taschereau, J., were of the opinion that a similar provision, without the words "subject to this Act," and without any provision, in the legislation as it then stood, equivalent to the present sec. 340, did not prohibit a railway company from entering into a special contract limiting its liability even for the consequences of its own negligence. And a similar opinion was expressed in this Court by Burton, J.A.: see *Vogel* v. *Grand Trunk R.W. Co.* (1884), 10 A.R. 162, 171, 172; and in effect by Patterson, J.A., at p. 183. That was before the days of the Railway Board, when efforts unduly to limit their responsibilities as common carriers were not infrequent on the part of railway companies, by means of "notices, conditions, and declarations," to which it could not be said that the consignees were parties otherwise than through an often doubtful notice of some kind. See the history of such efforts in the judgment of Strong, J., in the *Vogel* case, at p. 629 *et seq.*

Now, after the matter had repeatedly arisen in the Courts and formed the subject of much expensive litigation—see, among other cases, *Grand Trunk R.W. Co.* v. *McMillan* (1889), 16 Can. S.C.R. 543, 559; *Robertson* v. *Grand Trunk R.W. Co.* (1895), 24 Can. S.C.R. 611; *St. Mary's Creamery Co.* v. *Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1—the policy of the legislation, which received its present form in the year 1903 (see 3 Edw. VII. ch. 58, sec. 275 (D.), apparently is, to remit the question of what is a fair and reasonable contract between the carrier and the shipper to the Railway Board.

Such a policy, tending to secure reasonableness and justice between the parties, as well as definiteness and certainty in contracts which from their former obscurity were so often the subject of litigation, is, I think, wise and useful, and entitled to receive a liberal interpretation for the purpose of enabling it to

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accomplish its obvious purpose. And, so regarding it, I have no hesitation in holding that the contract in question was one the approval of which was well within the powers of the Board.

I would, for these reasons, allow the appeal and dismiss the action with costs.

MACLAREN, J.A.:—I agree.

MEREDITH, J.A.:—The learned trial Judge thought that the plaintiff might recover upon his common law rights; but has not made it very clear just which common law right he had in mind. Of course, if the plaintiff were within his legal rights in being upon the defendants' property, as he was, at the time of his injury, and if the defendants' "common law" liability were not in any way limited, he would have a right of action. But his rights, however they are put, must be measured by the duty the defendants owed to him; and that duty must depend upon his right to be where he was when injured. If he were a trespasser, he would have no right of action; because the defendants would not owe any duty to him in regard to the running of their train; and in the facts of this case, unless he was a passenger under the contract made by his master for his carriage, which contract he carried with him as evidence, and the only evidence, of his right of transportation, he was a trespasser, and cannot recover: and by the explicit terms of that contract the defendants are relieved from liability for the injury sustained, unless the law renders a contract for such relief ineffectual.

So it really all comes back to a question of the contract under which the plaintiff was rightly upon the defendants' property when he was injured.

The contract relieving the defendants from such liability was made in the plaintiff's presence, by his master, and the evidence, in writing, of such contract was then given to the plaintiff and always afterwards retained by him as his authority for being upon the defendants' property and as evidence of his right of transportation. Upon the face of the contract were printed in red ink and in large letters the words "Read this Special Contract;" and in the body of the "contract" the limitations of liability were headed by the words "Restrictions of Company's Liability;" under which the defendants were relieved from liability for the injury the plaintiff has sustained, in these plain words: "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full

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fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

It therefore appears to me to be quite plain that the plaintiff has no legal cause of action against the defendants in this case, unless by law they are prohibited from so limiting their liability; and I am unable to say that they are now so prohibited.

By section 284 of the Railway Act, railway companies are required to, among other things, "with due care and diligence, receive, carry and deliver" all traffic offered for carriage on the railway; and, under sub-sec. 7 of that section: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Then section 340 of the same Act proceeds to deal with the same subject, in these words (as set out in the judgment of Garrow, J.A., *supra.*)

When the present Railway Act was passed, the law in this respect was not in a very logical or satisfactory state. The holding of the Courts then was, that, though a railway company might not relieve itself from liability for negligence altogether, it might limit the amount of such liability. I speak, of course, in very general terms.

Then, when Parliament dealt with the question in passing the present Act, they seem to me, in the two sections from which I have quoted, to have solved the difficulty by leaving it to the Board of Railway Commissioners to determine under sec. 340, and, until that was done, to keep the old law in force under sec. 284. Thus reading these enactments gives effect to each, without any clashing in any respect, is in accord with the literal interpretation, and is just what one might have expected would have been done in the circumstances I have mentioned.

Sub-section 7 of sec. 284 is expressly made "subject to this Act," and so subject to sec. 340: and was necessary in order to maintain the law as it was, unless or until the Board should act

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under the latter section: and, generally speaking, putting the duty upon the Board was quite in accord with the purpose of Parliament in creating that Board, and in line with the other duties and powers given to it: see *Hayward* v. *Canadian Northern R.W. Co.* (1906), 4 W.L.R. 299; *Sheppard* v. *Canadian Pacific R.W. Co.* (1908), 16 O.L.R. 259; and *Sutherland* v. *Grand Trunk R.W. Co.*, 18 O.L.R. 139.

And, it being admitted that the Board had, long before the occurrence in question, acting under sec. 340, authorised the condition which I have quoted, the respondent's case fails in this respect also.

I would allow the appeal and dismiss the action.

LENNOX, J. (dissenting):—I think the appeal should be dismissed with costs.

I cannot agree with the argument so strenuously urged that the plaintiff must have occupied one or other of these alternative positions, namely: he was travelling as a trespasser; or, still worse, he was travelling upon and bound by the terms of what is called the "special contract."

This is not necessarily true. There is possible intermediate ground between these extremes; and, in my judgment, the undisputed facts clearly shew that the plaintiff occupied this intermediate position, that is, he was "lawfully upon the train," but he had neither notice nor knowledge of nor was he bound by the alleged special contract.

Parker, the shipper, swore:—

"I went down to the agent at Milverton to find out when I could get a car, and he asked me who was going with the horse. I says, 'I am not going to send anybody.' He says: 'We won't accept it unless you do; the rules of the company demand that a horse going over 100 miles, a person will have to accompany it.' I said, 'That is a horse of a different colour;' and a day or two afterwards I urged him to bring things to a head, because I wanted to get away on some business, and he wired me that he was going to send a man down. It was loaded up, and you know the rest.

"Q. You had no previous experience in shipping horses? A. No.

"Q. What did you do? A. I took the advice of this fellow who had experience.

"Q. But what did you do? A. I got a man to board off the end of the car for hay and that sort of thing. I was very well

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acquainted with Mr. Burgman, a reputable citizen, and I took his advice and did everything he advised me to do. In regard to the bill in question, there is a statement here that my name is signed to it. I remember signing some document; and, as the plaintiff has said, Mr. Burgman folded it up and shoved it across on the counter, and says 'That is yours.' I folded it up and said, 'I had better mail this to Dr. McCombe;' and he says 'No; better give it to this gentleman, for he will need it to indicate that he is accompanying the horse;' and I gave it to him, and that is the last I saw of it until to-day."

The defendants, as they had a right to do, insisted upon having a man accompany the shipment; and, in consequence, McCombe sent the plaintiff to Milverton to bring back the horse.

The plaintiff's evidence is:—

"Q. Coming down to the time you went down to Milverton, tell us the circumstances preceding your trip there? A. I left South River to go to Milverton to bring up a horse which Dr. Parker was purchasing there for Dr. McCombe, and I went there and saw Dr. Parker, and we drove out and saw several horses. Dr. Parker purchased a horse, and we loaded it on the car, and I left Milverton with the horse in the car, for home.

"Q. For your home? A. For my home.

"Q. Did you have anything handed to you? A. I had nothing. Well, I had a shipping bill handed to me.

"Q. And that is what has been referred to, and will be referred to, as this contract, this special contract? A. I believe so.

"Q. What did you do with it? A. I did not know it by that name. I put it in my pocket.

"Q. Did you do anything with it before putting it in your pocket? A. I did not.

"Q. How was it handed to you? A. It was handed to me by Dr. Parker; I would not swear just to be sure that it was Dr. Parker, or the agent, but I think it was Dr. Parker.

"Q. In what shape? A. Folded up.

"Q. You did what when it was handed to you? A. Put it in my pocket.

"Q. When did you first see that contract after that time? A. It was about a week after I was home, and I was running through my pockets one day, and thought Dr. McCombe should have had that, as he was shipping the horse, and I sent it down to Dr. McCombe."

On cross-examination the plaintiff said:—

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"Q. Did Dr. Parker sign this in your presence? A. I was standing right there, alongside Dr. Parker.

"Q. What did Dr. Parker say after he had signed the contract? A. He folded the contract up and said he would send that to Dr. McCombe by mail, and 'It will be there before you will be there,' and he says: 'No; you must give it to this man; he must carry it with him; and it shews that he is travelling with this car.' They just handed it to me, and I put it in my pocket.

"Q. And you never discovered it until after the accident? A. No.

"Q. You did not read it? A. No, sir, not until after the accident.

"Q. You paid no fare on the train going with the horse? A. No.

"Q. That is all you know of the transaction; you stayed with the horse all the way? A. I travelled with the horse all the way.

"Q. And the horse was on the same train as you were at the time of the accident? A. Yes, sir.

"Q. You were not asked for any fare by the trainmen? A. No.

"Q. And you were recognised as travelling with the horse? A. Certainly.

"Q. You were in charge of the horse, looking after it from time to time? A. Yes, at times.

"Q. The way-bill shewed you were in charge of the horse? A. I don't know anything about that.

"Q. You did not see the way-bill? A. I would not say that I did not see it. I saw the conductor in the caboose, with several bills.

"Q. Did he ask you were you the man in charge of the horse? A. No.

"Q. You were the only man there? A. I was the only man there?

"Q. And the only horse? A. Yes.

"Q. I presume he looked upon you as in charge of the horse? A. I presume so."

Clearly then, whatever may be argued as to his being barred from recovery by the contract signed by Parker, and I will deal with that later, the plaintiff was not a trespasser. On the contrary, the plaintiff accompanied the shipment, not only with the knowledge and approval, but at the instance, of the company's agent at Milverton—the agent acting in pursuance of the specific rules of the company—and this agent of the company, well know-

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ing the provisions of the agreement, sent him out upon his journey without a suggestion of any kind that the company's liability for negligence was limited or restricted in any way whatever. It is enough in this case that the plaintiff was "rightfully" upon the train—that he was there with the consent of the company. The plaintiff was injured by a collision. It is admitted that this was caused by the negligence of the company's servants. A bare licensee may not recover for negligent omission, or nonfeasance, whereas a bailee for hire or passenger can recover in such a case. The distinction is thoroughly discussed in *Blackmore* v. *Toronto Street R.W. Co.* (1876), 38 U.C.R. 172, and the plaintiff, claiming damages for the death of a newsboy, a mere volunteer upon the train, failed because there was an absence of what is frequently called "active" negligence; but even in that case it was conceded on all hands that it would have been otherwise had there been any misfeasance causing the accident. At p. 210, Hagarty, C.J., said: "It seems to me, with great deference, that in the Court below the distinction has not been sufficiently pressed between an injury arising from such a defect as the want of a step, and an injury from careless driving, or collision, or any other negligence in the act of carrying." That the plaintiff here was accepted as a passenger, I consider, is beyond question; but there is no object in elaborating this point, as there is no distinction in the liability of the company when the negligence is of the active kind.

For a direct authority shewing that negligence causing a collision is misfeasance and "active" negligence, see *Allen* v. *Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 510, where the English cases are collected, and the same case in appeal (1910), 21 O.L.R. 416.

In *Meux* v. *Great Eastern R.W. Co.*, [1895] 2 Q.B. 387, the contract was with the servant, the plaintiff was his employer, and the livery destroyed was hers—and it was held that, the cause of action, as in nearly all these cases, arising *ex delicto*, and the carelessness of the defendants' servant being shewn, it was enough that the plaintiff's goods were lawfully on the defendants' premises.

In *Marshall* v. *York, etc., R.W. Co.*, 11 C.B. 655, the position was reversed. Here the contract was made with the master, and the servant was injured, brought action, and recovered.

Once it is shewn that the persons injured or their goods were permitted by the company to be in the place where the injury is sustained, and the negligence is of the class here complained of, the company is liable. The most direct case I have come upon in

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our own Courts is *Jennings* v. *Grand Trunk R.W. Co.*, 15 A.R. 477. This case is important, too, as to the effect of an attempt of the employer to bind the employee. At p. 483, Osler, J.A., said: "We need not, therefore, decide whether notice to the deceased of the terms of the agreement with his employers, was essential to be proved in such an action as this, as the learned Chief Justice at the trial held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct. . . . There being then, as I hold, no agreement that the deceased should travel at his own risk, it is not material in an action like this, that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely." The learned Judge then points out that, there being no contract between the deceased and the defendants, the defendants owed no duty *ex contractu;* and, consequently, there could be no cause of action for nonfeasance. "But," he adds, "there would be that duty which the law imposes on all, namely, to do no act to injure another."

To the same effect are the judgments of Bramwell, L.J., and Baggallay, J., in *Foulkes* v. *Metropolitan District R.W. Co.* (1880), 5 C.P.D. 157; and the decision in *Austin* v. *Great Western R.W. Co.* (1867), L.R. 2 Q.B. 442.

In *Martin* v. *Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9, Baron Channell held that, so long as the injury complained of was "in the nature of an affirmative act," the plaintiff was entitled to recover. The contract was with the Government, and there was a special provision exempting the company from liability for negligence.

In *Collett* v. *London and North Western R.W. Co.* (1851), 16 Q.B. 984, the plaintiff was an officer, and the contract was with the Postmaster-General.

In *Sheerman* v. *Toronto Grey and Bruce R.W. Co.* (1874), 34 U.C.R. 451, Mr. Justice Wilson put his judgment upon the ground that "the deceased . . . was not there by fraud, nor as a trespasser . . . knowingly violating in the use of the car the purposes for which the defendants say it was only to be used; and he was, therefore, entitled as a matter of duty to be carried safely and securely by the defendants."

And, in delivering the judgment of the Supreme Court of the

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United States in *Philadelphia and Reading R.R. Co.* v. *Derby* (1852), 14 How. 468, Mr. Justice Grier, at p. 485, said: "If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover." In that case the plaintiff was paying no fare and was riding on the invitation of the president of the company.

Clearly then, I think, the first alternative is disposed of; the plaintiff was not a trespasser—he was rightfully upon the railway—and he is entitled to recover for the class of negligence here complained of, unless the defendants have effectively contracted themselves out of liability.

Then taking up the contract. Throughout the argument there seemed to be an undercurrent of suggestion that the plaintiff might in some mysterious way be bound by estoppel. What foundation is there for this? Brought out into the open, it means that he was bound by contract—bound by the special contract—or he is not bound at all. Here the plaintiff was never asked to make a contract, never authorised the making of one on his behalf, and never knew that there was a contract on his behalf. Did he not know or understand that his passage would be arranged for? Yes, but that would be a contract on behalf of McCombe; and, until he was told otherwise, he had no reason to anticipate special conditions or that he was being contracted out of his rights. And a great deal of stress was laid on the fact that this form of contract was approved by the Board. There is no magic in this. The question is not whether such a contract, *if made*, is binding, but whether such a contract, so far as the plaintiff is concerned, was made at all. The Board sanctions certain contracts, if made. It does not bring contracts into being, or dispense with the common law essentials—communication, knowledge, consent, and the like. Are these conditions in evidence in this case? Neither McCombe, who employed the plaintiff, nor his agent Parker, could, without express authority from the plaintiff, trade away his right to be carried safely, or indemnified in case of default; and Parker never bargained, or intended, and the company never asked Parker to bargain, to do so. Parker never read the agreement, and no word about reduced rates, option, special terms, or exoneration, was ever uttered to anybody. Indeed, if it were necessary to decide as to the effect of this document, even as against McCombe—for Parker has no interest in it—it might be difficult to determine in favour of its validity, seeing that the initial condition exacted by the Board, namely, an option afforded to the shipper to retain his ordinary remedy against the company if

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he desired, was entirely ignored—a condition, as I understand it, which must exist as a matter of fact, as a foundation, before such a contract as this can be entered into at all. If McCombe was not bound, it could hardly be binding upon the plaintiff. Be this as it may, at all events, to the plaintiff, so vitally interested in the company's proposal, it was never hinted that his rights as a passenger were being affected in any way, although he was within easy reach of the agent, and although the drastic provisions of this contract, and the exceptional risk of travel upon a freight train, must have been present to the agent's mind. Instead, he prevented the possibility of the plaintiff making the discovery, by neglecting the statutory condition of requiring signature. To the man who already knew of the contents of the contract, the signing might be immaterial, but it is a part of the sanctioned contract; it is to be strictly observed; and, when it comes to the case of a man who does not know the facts at all, it cannot be said to be unimportant. It was folded up—the conductor never asked for it—the plaintiff never read it. The agent should have informed him of its contents if he intended him to be bound. There is no special rate filled in, although there is a blank space left for it—the marginal reference to half fare is of the vaguest kind; and on this condition, and finding that there is no entry on the back where the name of the reduced fare passenger, if any, is to appear, if the plaintiff had read this agreement he would be quite likely to conclude, and I think not unreasonably, that no arrangement for reduced fare had been made. He could pay a full fare without the personal loss of a farthing. If either the agent or conductor had done his duty, this plaintiff might have been put upon his guard, and if the real situation, proposed, had ever become known to him, is it conceivable that he would have bartered away his protection for less than a mess of pottage—in fact have surrendered his rights against the company without advantage of any kind?

I am of opinion that the judgment of the learned trial Judge should be affirmed.

MAGEE, J.A., also dissented, agreeing with the opinion of LENNOX, J.

Appeal allowed; MAGEE, J.A., and LENNOX, J., *dissenting.*

NOTE.

An appeal from this judgment was allowed by the Supreme Court on May 6, 1913, restoring the judgment at the trial.

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DIGEST OF CASES.

ACCIDENT.

Additional Danger and Liability to—Break in Main Line.]—*See* SIDINGS.

ACTIONS.

Limitation of — Trespass — Continuing Damage — Railway Act, sec. 306 — *Application.*]—*See* EMINENT DOMAIN, 4.

ADVANTAGE.

Geographical — Unjust Discrimination — Foreign Rail Routes.]—*See* JURISDICTION OF BOARD, 2.

AGREEMENT.

For Rebate—Provincial Railway—Freight Tolls— Approval —Lieutenant-Governor-in-Council—Powers of Directors to Act without Authority of Shareholders — By-laws to Fix.]—*See* TOLLS, 4, 5.

AMENDMENT.

Reference to Sections of Statute.]—*See* ANIMALS, 1.

Special Act Referring to Prior General Act.]—*See* CONSTRUCTION OF STATUTES, 1.

ANIMALS.

1. *At Large—Killed on Track —Duty to Fence — Unenclosed Lands—"At Large" on Owner's Lands — Railway Act, secs.* 254, 294—*Negligence — Pleading — "Not Guilty by Statute" — Other Defences — Reference to Sections of Statute—Amendment.*] — The plaintiff resided and his stable was on the north-east quarter of a certain section of land, and he had a lease of the south-west quarter through which the defendants' railway ran, and both quarter sections were used by the plaintiff as pasture. There was no fence on the south-west quarter. On a morning in March, the plaintiff, as was his custom, led his horses out of the stable to feed, and they proceeded to the south-west quarter where they usually grazed, and eventually crossed the railway track to the south side, and were there when a train passed in the afternoon. When the horses saw the train, they started to run home, crossing the track in front of the train, which was running about twenty-five miles an hour, on a fairly straight track, in daylight. One of the horses, hav-

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ing crossed the actual track, got into a cut, and, stumbling over the wire brace of a telegraph pole, fell in between the engine and the tender, and was killed. It was on account of the depth of the cut and the snow that the horse could not escape, but was compelled having once started in it to follow the track:

Held, that there was no liability on the defendants to fence, the locality being one in which the lands on either side were not enclosed and either settled or improved: Dominion Railway Act, sec. 254.

Held, also, that, the animal having been killed on the property of the defendants, and there being no evidence of the existence of any highway, the burden was on the defendants, under sec. 294 of the Railway Act, to shew that the animals were at large through the negligence or wilful act of omission of the owner; and they had satisfied this onus by shewing from the plaintiff's own evidence, that when the horses were let out of the stable, they could go anywhere they wished—that no restraint was imposed on them, and no care taken to see that they did not go directly to the railway track.

Whether cattle are "at large" or no, depends upon whether they are under restraint or control, quite irrespective of whether they are on their owner's lands or not.

Review of the authorities.

If, however, the animals were not "at large" in this case, sec. 294 did not apply, and the plaintiff had no cause of action because the defendants were under no liability to fence.

Semble, that, upon the evidence, the injury might have been averted by more care on the part of the defendants' servants; but that was immaterial because the defendants owed no duty in respect of cattle trespassing on their property, in the circumstances of this case.

The defendants, in addition to pleading "not guilty by statute," pleaded a number of other defences, but, no leave to do so having been obtained, they were not considered: Rule 113, Judicature Act.

The statement of defence was also insufficient in not stating the sections of the special Act relied on; but an amendment was permitted in this respect. *Krenzenbeck* v. *Canadian Northern Ry. Co.,* 226.

2. *At Large—Wilful Act or Omission of Owner—Defective Fences—Railway Act, sec.* 294 (4).] — Action to recover the value of cattle found killed on the defendant's railway.

The plaintiff's cattle escaped by knocking down or jumping

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over a fence of insufficient strength and height from one pasture field to another, and from there got through the highway fence, part of which was constructed of brush with poles; thence along the highway, got over the cattle guards at the crossing and were killed by a passing train.

The plaintiff's son admitted that said cattle had got out to the highway more than once through the fences which he had fixed at different times in different places after they had got out.

Held, that the cattle got at large through the wilful act or omission of the plaintiff by reason of his fences both of the pasture field and at the highway being insufficient and insecure and he cannot recover their value from the defendant. *Wilkinson* v. *Grand Trunk Ry. Co.*, 236.

3. *At Large — Killed while Wandering on Tracks—Up-keep of Fences along Right-of-Way —Fences in Bad State of Repair —Railway Act, secs.* 252, 254, 294(4), 295—9 *&* 10 *Edw. VII. ch.* 50, *secs.* 8, 9.] — Railway companies who do not maintain their fences and gates in the condition provided by law, are at fault and liable for the loss of animals who thereby gain access to the tracks and are killed. *Bouchard* v. *Quebec Ry. Light & Power Co.*, 241.

4. *At Large — Fences — Breach of Statutory Duty—Liability.*] — A railway company which fails to maintain such fences and gates, as are required by the Quebec Provincial Railway Act, commits a breach of duty and will as a result be presumed responsible for any damages caused to animals escaping on to its right of way unless it can rebut absolutely the statutory presumption that it is responsible for the killing of the animals on the track.

Canadian Pacific Ry. Co. v. *Carruthers*, 39 S.C.R. 251, and *Rogers* v. *Grand Trunk Pacific Ry. Co.*, 22 Man. R. 349, 48 C.L. J. 155, specially referred to. *Rowe* v. *Quebec Central Ry. Co.*, 245.

5. *At Large—Killed on Track —Liability for—Railway Act, sec.* 294 (4, 5)*—Fences — Construction of Statutes — Negligence or Wilful Act or Omission of Owner.*]—The liability of a railway company, under subsections 4 and 5 of section 294 of the Railway Act, R.S.C. 1906, ch. 37, for damages in the case of animals at large killed or injured by a train is not limited to territory where the company is by section 254 obliged to erect suitable fences, and the company can only escape such lia-

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bility by shewing that the animals got at large through the negligence or wilful act or omission of the owner or his agent or the custodian of such animals or his agent.

The Railway Act of 1903 changed the law in this respect. *Bank of England* v. *Vagliano*, [1891] A.C., per Lord Herschell at p. 144, followed as to the interpretation of a statute intended to be a code of law on the subject referred to.

Arthur v. *Central Ontario Ry. Co.* (1906), 11 O.L.R. 537; *Bacon* v. *Grand Trunk Ry. Co.* (1906), 12 O.L.R. 196; *Lebu* v. *Grand Trunk Ry. Co.*, 12 O.L.R. 590; *Carruthers* v. *Canadian Pacific Ry. Co.* (1906), 16 Man. R. 323, 39 S.C.R. 251, and *Becker* v. *Canadian Pacific Ry. Co.* (1906), 7 Can. Ry. Cas. 29, followed.

The plaintiff had for two years been accustomed to turn his horses out of the stable in the winter to go without halters to a watering trough about fifteen yards away and driving them back to the stable after drinking. On the occasion in question, the plaintiff and his hired man were carrying out the usual routine when three of the horses after drinking, without their noticing it, walked off in the direction of the road instead of returning to the stable. When the fourth had finished drinking it started to walk after the others. The plaintiff observed this and immediately tried to intercept the horses, but the three escaped and, although the plaintiff followed them up at once and did his best to recover them, they eventually got on to the defendant's railway track and were killed by a train on a bridge.

That the plaintiff was not guilty of negligence or of any wilful act or omission in the matter so as to disentitle himself to recover. *Parks* v. *Canadian Northern Ry. Co.*, 247.

APPEAL.

Arbitrators—Findings, when Sustained — Quantum of Damages—Review — Railway Act — Rules of Decision — Provincial Courts—Privy Council — Analogy — Appellate Jurisdiction—Scope.]—*See* AWARD, 1, 3.

Review of Fact — Absence of Evidence to Support Jury's Findings.]—*See* NEGLIGENCE, 4.

ARBITRATION.

Award — Conclusiveness — Setting Aside—Failure to Carry out Undertaking.]—*See* AWARD, 2.

ARBITRATORS.

Award — Railway Act — Review.]—*See* AWARD, 1.

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AWARD.

1. *Appeal — Of Arbitrators— Eminent Domain — Review of.*] —(1)No appeal lies in the Province of Quebec to the Court of King's Bench from the judgment of the Superior Court upon an appeal under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, from the award of an arbitrator.

(2) An application to the Superior Court in the Province of Quebec under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, to set aside an award of arbitrators, made in expropriation proceedings under that Act, on the ground of the inadequacy of the compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from a decision of an inferior court, and that the court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application. *Rolland* v. *Grand Trunk Ry. Co.*, 21.

2. *Conclusiveness — Arbitration—Setting Aside for Failure to Carry out Undertaking — R.S.C. 1906, ch. 37, sec. 198.*]— An award made by arbitrators appointed under sec. 196 of the Railway Act, R.S.C. 1906, ch. 37, to ascertain the compensation that should be paid for injuries to land not actually taken or used by the railway, the owners claiming that the land was injuriously affected because the railway was built between the land and the sea, thereby cutting off the rights of access to the sea, will be set aside because of the failure of the arbitrators to keep a promise made by them to the owners of the land when the suggestion was offered on the arbitration proceedings that the question of the applicability of sec. 198 of the Railway Act, R.S.C. 1906, ch. 37, to such a case should be referred to the Court, which promise was that they, the arbitrators, should have it appear on the face of the award whether or not such section applied. *In re Vancouver, Victoria & Eastern Ry. Co.*, 101.

3. *Rules of Decision—Provincial Courts Following Decision of Privy Council—Railway Act (B.C.)—Analogy—Railway Act —Appeal—Review of Facts — Eminent Domain—Scope of Appellate Jurisdiction—Findings, when Sustained — Quantum of Damages.*]—(1) Under the British Columbia Railway Act

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upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where the principle applicable to such an appeal has already been laid down by the Privy Council under the Canadian Railway Act, 1888, which is, so far as material, identical in language with the British Columbia Statute, that construction will be adopted.

(2) Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the Court will not supersede the arbitrators, but will review the award as it would review the judgment of a subordinate Court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law.

Atlantic and North-west Railway Co. v. *Wood*, [1895] A.C. 257, 64 L.J.P.C. 116, followed, under which a similar question under sub-sec. 2 of sec. 161 of the Canadian Railway Act, 1888, being sec. 168 of 3 Edw. VII. (Can.) ch. 58, was decided.

(3) Under the British Columbia Railway Act, R.S.B.C. 1911, ch. 194, sec. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where conflicting views as to the quantum of damages were apparent, but the estimate made in the award cannot be said to be unreasonable or manifestly incorrect, the findings of the arbitrators will not in that respect be disturbed, the arbitrators having seen and heard the witnesses and viewed the land in question. *Canadian Northern Pacific Ry. Co.* v. *Dominion Glazed Cement Pipe Co.*, 265.

BILL OF LADING.

Provision for Protecting Goods against Frost — Consignee Refusing to Accept Delivery.]— *See* CARRIERS, 1.

BOARD.

Railway and Municipal — Order of — Jurisdiction—Railway Act, 6 Edw. VII. ch. 30 (O.), sec. 57 (4-6) — Municipally Owned Railway.] — *See* TRAFFIC.

BRIDGE.

Cost of Overhead — Municipality.]—*See* HIGHWAYS, 1.

Proper and Suitable Structure — New Highway — Cost to be borne by Municipality.] — *See* HIGHWAYS, 4.

Railway Yard — Apportionment of Cost.] — *See* HIGHWAY, 5.

Railway and Traffic—Repair and Maintenance—Usual Rule.] —*See* JURISDICTION OF BOARD, 7.

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And Semaphore Lights — Swing.]—*See* NEGLIGENCE, 1.

CARRIERS.

1. *Of Goods—Provision in Bill of Lading for Protecting Goods against Frost — Onus on Connecting — Unreasonable Delay in Delivering —Presumption as to Loss or Damages—Consignee Refusing to Accept Delivery — Damage Through Negligence — Payment of Part—Effect of as to other Damage.*]—(1) Where, under a bill of lading which required protection of goods from frost, a carrier has had possession, for an unreasonably long time during very cold weather, of a consignment of figs, which were found to be frozen upon arrival at their destination, a *primâ facie* case of negligence on the part of that carrier is established which casts the onus upon it, in order to escape liability of shewing that the consignment was in a damaged condition when received from the connecting carrier.

(2) Where it appears that the climate at the point of shipment precludes the frosting of a consignment of figs at the time of their delivery to an initial carrier, and that a connecting carrier had possession of them for an unreasonably long time in very cold weather without offering any acceptable explanation for the delay, a strong presumption arises that if they were damaged by frost it was while in the latter's possession.

(3) A consignee is justified in refusing to accept a consignment of figs, which, through the negligence of the carrier, were frozen in transit.

(4) The payment by a common carrier of damages for injuries to a portion of a consignment of goods is not an admission of liability in respect to other portions thereof. (*Per* Irving, J.A.) *Hennell* v. *Davies*, [1893] 1 Q.B. 367, followed. *Albo* v. *Great Northern Ry. Co.*, 82.

2. *Of Goods—Shipment — Express Company's Receipt to Party other than their Customer — Special Conditions — Stipulations Limiting Liability.*] — (1) A person who forwards his railway baggage checks to an express company with instructions to take delivery of the baggage and reforward it by express may claim damages for its loss in transit while in their custody as upon the company's common law liability, and is not bound by a condition of a shipping receipt issued to the railway company on receiving delivery from it, purporting to limit the maximum liability of the express company in case of loss, where the contract evidenced by such shipping receipt is in terms made between the express com-

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pany and the railway company only and its provisions were not communicated to the owner of the baggage.

But see *Edwards* v. *Sherratt*, 1 East 604; *Lohden* v. *Calder*, 14 T.L.R. 311; *Hayward* v. *Canadian Northern Ry. Co.*, 6 Can. Ry. Cas. 411; *Mercer* v. *Canadian Pacific Ry. Co.*, 8 Can. Ry. Cas. 372.

(2) The fact that an express company is enabled by statute to make use of a special form of contract impairing, restricting, or limiting its liability does not prevent the company from contracting upon the basis of a more extended liability as upon its contractual rights at common law, although such special form has received the approval of the Railway Commissioners of Canada, exercising governmental powers of supervision over common carriers. *Wilkinson* v. *Canadian Express Co.*, 267.

3. *Of Goods — Delivery to — Presumption as to Contents of Box—Course of Business—Absence of Direct Evidence.*]—In the absence of direct evidence the contents of a box of military supplies was sufficiently shewn in an action by the Crown against a railway company for its loss, by the testimony of the officer in charge of the supplies, that he selected them from the general stores and turned them over to a person of excellent characer, whose duty it was to box and ship them, and that the latter delivered a heavy box to the railway company, which receipted for it, and that such person could not be produced at the trial, as his term of enlistment had expired, and his whereabouts was unknown. *Rex* v. *Canadian Pacific Ry. Co.*, 270.

4. *Shipment of Perishable Goods in Box Car — Shipper's Omission to Order Refrigerator Car at Higher Toll.*]—Where butter is shipped in a box car and the weather is such that a refrigerator car is necessary to keep it in good condition, and the plaintiff's agents, the consignees, caused a delay in delivery by failing to pay the freight charges, the defendants are not liable for injury to the butter where an unreasonable time is not occupied in making delivery. *Lessard* v. *Canadian Pacific Ry. Co.*, 277.

5. *Liability to Caretaker of Stock—Reduced Fare — Privity —Exemption from Liability.*]—One travelling upon a railway in charge of live stock at a reduced fare, which is paid by the shipper of the live stock, is not bound by a special contract between the shipper and the railway company relieving the company from liability in case of his death or injury, of which he had no knowledge, to which he was not a party, and from which

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he derived no benefit. *Goldstein* v. *Canadian Pacific Ry. Co.*, 23 O.L.R. 536, specially referred to. *Robinson* v. *Grand Trunk Ry. Co.*, 441.

6. *Liability to Caretaker of Stock — Reduced Fare — Exemption from Liability — Jurisdiction—Railway Act, sec.* 340.] —(1) One who travels upon a railway in charge of live stock, at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train at all, cannot be heard to deny that he is travelling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company.

(2) It is within the power of the Railway Board under the provisions of the Railway Act, sec. 340, to authorize a contract relieving the company from liability to one travelling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise. *Robinson* v. *Grand Trunk Ry. Co.*, 444.

Foreign — Competition.] — *See* JURISDICTION OF BOARD, 2.

Discretion of — Stop-over Privileges — Storage, inspection or Completion of Carload.] — *See* JURISDICTION OF BOARD, 9.

Canadian and Foreign—Tolls —Through — Increase — Proportional.]—*See* TOLLS, 6.

CARS.

Box — Refrigerator — Shipment of Perishable Goods — Higher Toll.]—*See* CARRIERS, 4.

Of another Railway — Interswitching.]—*See* EMBARGO.

Foreign—Competition— Tolls — Reasonableness.] — *See* JURISDICTION OF BOARD, 2.

Coupling — Equipment — Foreign — Interchanged — Statutory Conditions — Railway Act, secs. 264(5), 317.] — *See* NEGLIGENCE, 3.

Running Past Stationary — Usual Stopping Place.]—*See* NEGLIGENCE, 5.

Tracing — Brakeman.] — *See* NEGLIGENCE, 6.

Teamster Unloading — Nonrepair of Roadway.] — *See* NEGLIGENCE, 7.

CARTAGE.

Jurisdiction — Increase of Tolls.]—*See* TOLLS, 7.

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CASES.

AFFIRMED, REVERSED, FOLLOWED, REFERRED TO AND APPLIED.

Arthur v. *Central Ontario Ry. Co.*, 11 O.L.R. 537, 5 Can. Ry. Cas. 318, followed, p. 247.

Atlantic & Northwest Ry. Co. v. *Wood*, [1895] A.C. 257, followed, p. 265.

Bacon v. *Grand Trunk Ry. Co.*, 12 O.L.R. 196, 5 Can. Ry. Cas. 325, followed, p. 247.

Becker v. *Canadian Pacific Ry. Co.*, 7 Can. Ry. Cas. 29, followed, p. 247.

Bernina, The, 12 P.D. 89, 13 App. Cas. 1, followed, p. 293.

Black v. *Delaware & Raritan Canal Co.*, 22 N.J. Eq. 402, referred to, p. 111.

Board of Railway Commissioners and Canadian Northern Ry. Co., In re (Fencing Case), 42 S.C.R. 143, 10 Can. Ry. Cas. 104, followed, p. 11.

Brill v. *Toronto Ry. Co.*, 13 O.W.R. 114, distinguished, p. 92.

British Columbia Sugar Refining Co. v. *Canadian Pacific Ry. Co.*, 10 Can. Ry. Cas. 159, followed, p. 189.

Brown v. *The King*, 12 Ex. C.R. 463, specially referred to, p. 36.

Burrows v. *March Gas & Coke Co.*, L.R. 5 Ex. 67, followed, p. 293.

Canadian Oil Cos. v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.*, 12 Can. Ry. Cas. 350, followed and affirmed, pp. 142, 201.

Canadian Pacific Ry. Co. v. *Carruthers*, 39 S.C.R. 251, 7 Can. Ry. Cas. 23, specially referred to, p. 245.

Canadian Portland Cement Co. v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211, followed, pp. 189, 375.

Carruthers v. *Canadian Pacific Ry. Co.*, 15 Man. R. 323, 6 Can. Ry. Cas. 15, followed, p. 247.

Continental Prairie and Winnipeg Oil Cos. v. *Canadian Pacific et al. Ry. Cos.*, 13 Can. Ry. Cas. 156, followed, p. 183.

Davy v. *Niagara, St. Catharines & Toronto and Michigan Central Ry. Cos.*, 12 Can. Ry. Cas. 61, followed, p. 189.

Dodge v. *The King*, 38 S.C.R. 149, specially referred to, p. 36.

Dominion Millers' Association v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 12 Can. Ry. Cas. 363, followed, p. 189.

Eby et al. v. *Grand Trunk Pacific Ry. Co.*, 13 Can. Ry. Cas. 22, followed, p. 377.

Edwards v. *Sherratt*, 1 East 604, referred to, p. 267.

France v. *Gaudet*, L.R. 6 Q.B. 199, followed, p. 26.

Grand Trunk Ry. Co. v. *McKay*, 34 S.C.R. 81, 3 Can. Ry. Cas. 52, followed, p. 51.

Grand Trunk Ry. Co. v. *Rainville*, 29 S.C.R. 201, specially referred to, p. 85.

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Great Central Ry. Co. v. *Lancashire & Yorkshire Ry. Co.*, 13 Ry. & Ca. Tr. Cas. 266, referred to, p. 111.

Hammans v. *Great Western Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 181, referred to, p. 111

Hansford v. *Grand Trunk Ry. Co.*, 13 O.W.R. 1184, at p. 1187, referred to, p. 401.

Hayward v. *Canadian Northern Ry. Co.*, 16 Man. R. 158, 6 Can. Ry. Cas. 411, referred to, p. 267.

Hennell v. *Davies*, [1893] 1 Q.B. 367, followed, p. 82.

Keith v. *Ottawa & New York Ry. Co.*, 5 O.L.R. 116, 2 Can. Ry. Cas. 26, applied, p. 317.

Kutner v. *Phillips*, [1891] 2 Q.B. 267, specially referred to, p. 51.

Lamond v. *Grand Trunk Ry. Co.*, 16 O.L.R. 365, 7 Can. Ry. Cas. 401, followed, p. 293.

Lebu v. *Grand Trunk Ry. Co.*, 12 O.L.R. 590, 5 Can. Ry. Cas. 329, followed, p. 247.

Lloy v. *Town of Dartmouth*, 30 N.S.R. 208, specially referred to, p. 216.

Lohden v. *Calder*, 14 T.L.R. 311, referred to, p. 267.

Lovell v. *Howell*, 1 C.P.D. 161, followed, p. 293.

Manufacturers' Coal Rates Case, 3 Can. Ry. Cas. 438, followed, p. 142.

Marleau v. *Grand Trunk Ry. Co.*, Q.R. 38 S.C. 294, 12 Can. Ry. Cas. 149, reversed in part, p. 284.

McCartan v. *Belfast Harbour Commissioners*, [1911] 2 Ir. R. 143, 44 Ir. L.T. 223, referred to, p. 405.

McMullin v. *Nova Scotia Steel & Coal Co.*, 39 S.C.R. 593, 7 Can. Ry. Cas. 198, followed, p. 293.

Mercer v. *Canadian Pacific Ry. Co.*, 17 O.L.R. 585, 8 Can. Ry. Cas. 372, referred to, p. 267.

Metropolitan Paving Brick Co. v. *Ann Arbour Ry. Co.*, 17 I.C.C.R. 197, referred to, p. 172.

Morgan v. *Vale of Neath Ry. Co.*, L.R. 1 Q.B. 149, followed, p. 293.

New v. *Toronto, Hamilton & Buffalo Ry. Co.*, 8 Can. Ry. Cas. 50, followed, p. 329.

Preston & Berlin Street Ry. Co. v. *Grand Trunk Ry. Co.*, 6 Can. Ry. Cas. 142, followed, p. 360.

Rainville v. *Grand Trunk Ry. Co.*, 25 A.R. 242, specially referred to, p. 85.

Regina Board of Trade v. *Canadian Pacific and Canadian Northern Ry. Cos.* (*Regina Toll Case*), 11 Can. Ry. Cas. 380, referred to, p. 354.

Rogers v. *Grand Trunk Pacific Ry. Co.*, 22 Man. R. 349, 48 C.L.J. 155, specially referred to, p. 245.

Smith v. *Grand Trunk Ry. Co.*, 3 O.W.N. 379, affirmed, p. 300.

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Waller v. *South Eastern Ry. Co.*, 2 H. & C. 102, followed, p. 293.

Welland, Town of, v. *Canadian Freight Association* (*Plymouth Cordage Co.'s Case*), 13 Can. Ry. Cas. 140, followed, p. 222.

Winnipeg Jobbers & Shipper's Association v. *Canadian Pacific, Canadian Northern and Grand Trunk Pacific Ry. Cos.* (*Flag Station Case*), 8 Can. Ry. Cas. 151, referred to, p. 1.

Wright v. *Grand Trunk Ry. Co.*, 12 O.L.R. 114, 5 Can. Ry. Cas. 96, specially referred to, p. 91.

CAUSE.

Proximate — Several Concurrent Fires.]—*See* FIRES, 2.

CLASSIFICATION.

C.L. Rating — Gramophones and Graphophones — "Musical Instruments.] — Gramophones and graphophones should be classified with musical instruments and given a second class carload rating. *Berliner Gramophone Co.* v. *Canadian Freight Association*, 175.

COLLISION.

Fixing Liability — Death of Fireman on Snow Plough—Unqualified Signalman—Engineer Running Snow Plough.]—*See* NEGLIGENCE 4.

With Vehicle—Street Railway — Ultimate Negligence.]—*See* NEGLIGENCE, 8.

Rear End—Failure by Motorman to Observe Rules—Street Railway.]—*See* NEGLIGENCE, 11.

COMPENSATION.

Measure—Wrongful Removal of Spur Track—Sufficiency of Proof as to Damages—Discrepancy as to Cost of Hauling Coal and Lumber — Demurrage — Longer Haul—Element in Fixing Damages.]—(1) The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which track, at small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard.

(2) The award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would

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handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day.

(3) Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner. *Robinson* v. *Canadian Northern Ry. Co.*, 281.

Measure of—Right to—Damages — Trespass.]—*See* EMINANT DOMAIN, 1.

None for Easement to Carry Highway over Railway—Municipality.]—*See* HIGHWAYS. 1.

To Abutting Land Owners—Railway Upon Highway—Owner of Land — Prior to Change — Purchasers — Subsequent to Change — Notice.]—*See* JURISDICTION OF BOARD, 3.

COMPETITION.

Foreign Carrier — Tolls — Reasonableness.]—*See* JURISDICTION OF BOARD, 2.

All Rail and Lake and Rail —East and West Bound — Routes — Unjust Discrimination.]—*See* TOLLS, 8.

Tolls — Fifth-class — Commodity — Higher Basis—Parity — Long and Short Haul.]—*See* UNJUST DISCRIMINATION, 4.

By Water—Tolls — Reasonableness — Ex-lake — Reduction.]—*See* UNJUST DISCRIMINATION, 5.

East and West Bound — Routes — Tolls — Reduction—Comparison — Basis.]—*See* UNJUST DISCRIMINATION, 6.

CONSTITUTIONAL LAW.

Railway Company Incorporated under Dominion Parliament —Provincial Legislation Regulating Work on Sunday—Right of Parliament to Pass—R.S.C. 1906, *ch.* 37, *sec.* 9 — *Operation on Sunday—Continuous Route—Legislative Intent — Power of Courts to Question the Reasonableness of the Enactment—6 Edw. VII. ch.* 30, *sec.* 193 (*O.*). —(1) Section 9 of the Railway Act, R.S.C. 1906, ch. 37, enacting that every railway situated wholly within one province of Canada and declared by Parliament to be either wholly or in part a work for the general advantage of Canada, shall be subject to any Act of the Legislature of the province in which it is situated prohibiting or regulating work on Sunday, is

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intra vires of the Parliament of Canada.

(2) In order that a railway or part of a railway may form part of a continuous route or system within the meaning of sub-sec. 5 of sec. 9 of the Railway Act, R.S.C. 1906, ch. 37, respecting operations on Sunday, there must be a direct physical connection between it and the other through road of which it is to form a part, and proper facilities by way of sidings and accommodations for the transfer of traffic must exist, which should generally be sanctioned by the proper authorities: *Hammans* v. *Great Western Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 181; *Great Central Ry. Co. v. Lancashire & Yorkshire R. Co.*, 13 Ry. & Ca. Tr. Cas. 266; *Black* v. *Delaware & Raritan Canal Co.*, 22 N.J. Eq. 402, referred to.

(3) In considering the constitutionality of any enactment of a Provincial Legislature, every intendment will be made to support it, and it is not the business of the Courts to pass upon its wisdom or reasonableness, but simply to say whether it is fairly within the area of the constitutional powers of the Legislature.

(4) Section 193 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, respecting operation on Sunday is, by virtue of sec. 9 of the Railway Act, R.S. C. 1906, ch. 37, binding upon an electric railway situate wholly within the Province of Ontario, which was incorporated by the Parliament of Canada in 1910, and declared to be a work for the general advantage of Canada. *Kerley v. London & Lake Erie Transportation Co.*, 111.

CONSTRUCTION OF STATUTES.

1. *Special Act Referring to Prior General Act—Amendment —Special Legislation — Public Service Corporation — User of Highway — Control by General Statute—Right to Erect Poles on Street.*]—(1) Where a general clause of another statute is by the incorporating Act made applicable to a corporation, and its undertakings by a reference which does not specify an amendment already made to such general clause, such amendment is to be read as forming part of the company's Act of incorporation and will control the powers granted to the company.

[The Interpretation Act, R.S. C. 1906, ch. 1, sec. 20 (*b*) construed.]

(2) A clause in a general Act making it a condition precedent to the erection of electric light poles and wires, in a municipality, that the consent of the municipal council shall be first obtained and that the whole work incident to the erection of the

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poles shall be under the supervision of an appointee of the council, is not inconsistent with nor superseded by special provisions contained in the Act of incorporation of an electric light company conferring upon it the power to erect poles in a street, and to operate the business of the company and making the company responsible for damages caused in carrying on or maintaining their works.

(3) Powers conferred by a special Act of Parliament incorporating an electric light and power company whose powers include the erection of poles and the doing of all things necessary for the transmission of light, heat, and power, provided that the same is done so as not to "incommode" the public use of streets are not in conflict with the provisions of an amended section of a general Act, which is made applicable to the corporation by its Act of incorporation, and which makes it a condition precedent to the erection of poles that the consent of the municipal council shall be first obtained. *Toronto & Niagara Power Co.* v. *Town of North Toronto,* 379.

2. *Giving Effect to Whole Statute—Speculation as to Legislative Intent — Intention of Parliament — Railway Act, R. S.C.* 1906, *ch.* 37, *sec.* 248—*Highways—User of — Special Act Conferring Powers on Electric Light Company — Erection of Poles in Street.*]—(1) In deciding a question of statutory construction, a Court of justice is not entitled to speculate as to which of two conflicting policies was intended to prevail, but must confine itself to the construction of the language of the relevant statutes taken as a whole.

(2) The language of the Railway Act, R.S.C. 1906, ch. 37, expresses an intention to preserve intact all powers conferred by previous special Acts of incorporation upon companies within its scope, except where otherwise specifically mentioned.

(3) Section 248 of the Railway Act, R.S.C. 1906, ch. 37, shews that, where Parliament intended by that Act to interfere with the powers of companies other than railway companies, it has done so by special provision.

(4) The powers conferred upon the Toronto and Niagara Power Company by sections 12 and 13 of its Act of incorporation of 1902, remain intact notwithstanding the provisions of Railway Act, R.S.C. 1906, ch. 37, and that company is entitled to erect poles for the purpose of stringing power of transmission lines along the streets of a municipality, without the consent of the municipality. *Toronto &*

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Niagara Power Co. v. *Town of North Toronto*, 392.

Railway Act, sec. 294 (4, 5)—*Fences — Negligence or Wilful Act or Omission of Owner—At Large.*]—*See* ANIMALS, 5.

CONTRACT.

Master and Servant — Workmen Hired in Quebec to be Employed in Quebec and Ontario—Accident, for Which Employer is Liable, Happening in Ontario—Law Applicable Thereto —Jury Trial.] — (1) Common law liability, in cases involving *delict* or *quasi-delict*, is governed by the *lex loci regit actum*. Hence workmen hired in Quebec to be employed in Quebec and Ontario, who are injured by the positive act or by the fault of their employers in the latter province, have no remedy except under the provisions of its laws.

(2) When the evidence shews that the foreign law does not admit of the remedy relied upon by the plaintiff, and upon which a verdict has been given in his favour by the jury, he must be nonsuited, *non obstante veredicto*, a new trial being ineffective. *Marleau* v. *Grand Trunk Ry. Co.*, Q.R. 38 S.C. 394, 12 Can. Ry. Cas. 149, reversed in part. *Grand Trunk Ry. Co.* v. *Marleau*, 284.

Requisites — Sale of Land—Effect of Taking Possession.]—*See* EMINENT DOMAIN, 3.

Location of Station—Change in.]—*See* STATIONS, 2.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 3.

COST.

Installation — Maintenance—Protection.]—*See* HIGHWAYS, 2.

To be Borne by Municipality —New Highway.]—*See* HIGHWAYS, 4.

Apportionment of — Railway Grade Crossing Fund — Railway Yard—Protection — Construction, Installation, Maintenance and Operation.] — *See* HIGHWAYS, 5, 6.

Apportionment of — Steam Railway and Electric Street Railway—Railway Grade Crossing Fund.]—*See* SEPARATION OF GRADES, 2.

DAMAGES.

Presumption as to Loss or—Effect as to Other—Payment of Part — Unreasonable Delay in Delivering.]—CARRIERS, 1.

Sufficiency of Proof as to—Wrongful Removal of Spur Track — Element in Fixing.]—*See* COMPENSATION.

Measure of—Special — Right to—Notice to Treat — Abandon-

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ment—Loss of Profit.] —. *See* EMINENT DOMAIN, 1.

Continuing — Limitation of Actions — Railway Act, sec. 306 *—Application.*]—*See* EMINENT DOMAIN, 4.

DEMURRAGE.

Longer Haul — Element in Fixing Damages—Wrongful Removal of Spur Track.]—*See* COMPENSATION.

DIRECTORS.

Powers of to Act Without Authority of the Shareholders —Provincial Railways.] — *See* TOLLS, 5.

EASEMENT.

Right Acquired — Abandonment.]—*See* EMINENT DOMAIN, 4.

No Compensation for—Municipality.]—*See* HIGHWAYS, 1.

EMBARGO.

On Cars of Another Railway —Interswitching— Private Sidings — Unjust Discrimination.] —The Railway Commission may order discontinued an embargo placed by a railway against receiving, for interswitching delivery, upon private sidings of their line, the loaded cars of another railway from stations on such other railway, if taken merely as a means whereby to recover cars of the railway placing such embargo located along the line of the railway from which the shipments originated, where there were at the points of shipment no cars belonging to the railway seeking to enforce such embargo available for the use of the shippers affected thereby.

The limitation of the movement on this inter-line traffic to respondent's cars alone is unjustly discriminatory, and should forthwith be removed. *Marchand Sand Co.* v. *Canadian Pacific Ry. Co.*, 224.

EMINENT DOMAIN.

1. *Damages — Special—Trespass — Measure of Compensation—User of Land—Notice — Forcible Possession of Land— Anticipated Use — Right to — Notice to Rent — Abandonment —Loss of Profits — Exclusion from Land.*]—(1) The rental value of land is not to be adopted as the measure of damages for a trespass thereon if special damage is alleged and proved, and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and natural and probable use of his land.

(2) A trespasser on lands is to be dealt with as having notice or knowledge that the owner of the land will try to use it in any reasonable and usual way which

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may be profitable to him, and is accountable for damages accordingly. [10 Halsbury's Laws of England 317, discussed; *Lloy* v. *Dartmouth*, 30 N.S.R. 208, specially referred to.]

(3) The extension by the owner of land of an existing pig corral is not such a peculiar and unusual use of the land as will relieve a trespasser from the duty of anticipating the probability of it, and being charged in damages for the interference with the owner's intended exercise of his right in that respect.

(4) The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

(5) Where excavations and other trespasses by a railway company prevented the land owner from extending his pig corral so as to keep the increase of the pigs and the corral thereby became crowded and unhealthy, resulting in the death of some of the pigs and the depreciation of others in value, the owner will be limited to such damage as would have resulted had he reduced the number of his pigs to what he had theretofore safely kept, and he cannot recover as special damage more than the difference in the selling value, at the time of the trespass of the pigs he should have removed and sold for lack of accommodation to keep them and their value at the time when they would have been the most fit to sell less the saving in feed and labour by reason of the reduced numbers. *Marson* v. *Grand Trunk Pacific Ry. Co.*, 26.

2. *Value of Lands.*] — The value of lands expropriated for a public work is to be determined *primâ facie* upon the basis of the market price, but the prospective capabilities of the property have to be taken into account in ascertaining the market price, and an additional allowance made for compulsory expropriation. *Brown* v. *The King*, 12 Ex. C.R. 463, and *Dodge* v. *The King*, 38 S.C.R. 149, specially referred to. *The King* v. *Moncton Land Co.*, 36.

3. *Status of Party Attacking Proceedings—Service of Notice —Title—Contract — Requisites —Sale of Land—Effect of Taking Possession.*]—(1) On an application to the Court to restrain expropriation proceedings taken by a railway company on the ground that the company had agreed upon a price with the plaintiff, the

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plaintiff's status is proved *primâ facie* by shewing that he had been served as owner with notice of arbitration proceedings by the company without his further shewing his title or interest in the land.

(2) A contract to purchase is not established as against a railway company entitled to take lands by eminent domain proceedings, by the fact of the company having taken possession of same after notice from the owner naming his price and stating that if they took possession he would construe their action as an acceptance of his terms. *Haney* v. *Winnipeg & Northern Ry. Co.*, 39.

4. *Right Acquired—Abandonment—Easement — Trespass — Laying Side-track — Taking Possession of Strip Not of Statutory Width—Limitation of Actions — Continuing Damage — Railway Act, sec.* 306—*Application.*]—(1) The title to land expropriated for a right-of-way by a railway company that received a subsidy under 27 Vict. (N.B.), ch. 3, 1864, and 28 Vict. (N.B.), ch. 12, 1865, is, by the provisions of such Acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

(2) A railway company cannot, in an action for a trespass in laying side-tracks on the plaintiff's land, justify on the ground that its predecessor in title, without right, took a strip of land twelve feet wide from that owned by the plaintiff, for part of its right-of-way, which was not, at such place, of the width allowed by statute, and that therefore it became entitled to claim the full ninety-nine feet allowed by statute for a right-of-way, which would include the land on which the side-tracks were laid, since the Court cannot presume that the company, by taking possession of the twelve foot strip, also took possession of the entire ninety-nine feet which it was entitled to expropriate for a right-of-way.

(3) An action against a railway company for a trespass committed by laying side-tracks on the plaintiff's land, is not an action for injuries sustained by reason of the construction or operation of a railway which must, under sec. 306 of ch. 37, of the Railway Act, R.S.C. 1906, be brought within one year after the cause of action arose.

4. Where an injury or damage caused by the construction or operation of a railway is continuing, the limitation of one year for bringing an action therefor, as prescribed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, does not apply.

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Carr v. *Canadian Pacific Ry. Co.*, 40.

See AWARD, 1, 3.

EVIDENCE.

Absence of Direct—Presumption as to Contents of Box — Course of Business.]—*See* CARRIERS, 3.

EXPRESS COMPANIES.

Tolls — Latitude in Regulating — Over Two or more Lines — Sum of the Locals — Jurisdiction—Exclusive Operation.] —(1) Traffic handled by two or more companies over connecting lines may well bear a heavier toll than if handled by one only and where two cmpanies charged tolls equal to the sum of the locals over their respective lines, the Board refused to interfere in the absence of proof that the charges were excessive, notwithstanding that a lower through toll had formerly been charged when one express company operated over both lines.

(2) The Board cannot compel an express company to operate and compete over the line of a railway from which it has withdrawn by reason of the acquirement of the line by a railway operating an express service through its allied express company. *Continental, Prairie and Winnipeg Oil Cos.* v. *Canadian Pacific et al. Ry. Cos.*, 13 Can. Ry. Cas. 156, followed. *Shippers by Express* v. *Canadian Northern Express and Central Ontario Ry. Cos.*, 183.

Receipt to Party other than their Customer — Special Conditions — Stipulations Limiting Liability.]—*See* CARRIERS, 2.

FARM CROSSINGS.

1. *Legal Servitude — Railway Act*, secs. 252, 253 — *Crossings for the Convenience of Lands over which Railway is Carried — Rights and Obligations of the Companies and of the Proprietors — Jurisdiction.*] — *Held*, the crossings which railway companies are bound to make for the convenience of the lands over which the line is carried, is a legal servitude, and the proprietors are not obliged to establish a title.

When a railway company has once provided crossings which it recognizes as being necessary, it cannot abolish one, under the pretext that one crossing is sufficient. The Board of Railway Commissioners has no power to declare that an existing crossing is useless. *Saindon* v. *Temiscouata Ry. Co.*, 326.

2. *Crossing in the Nature of — Access to Highway — Construction and Maintenance — Gates.*]—The Board granted a crossing in the nature of a farm crossing from the applicants'

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lands to a highway upon condition that all expenses of construction and maintenance be borne by the applicants and that gates be established, which must be kept closed, on both sides of the railway. *New* v. *Toronto, Hamilton & Buffalo Ry. Co.*, 8 Can. Ry. Cas. 50, followed. *Richards & Bennett* v. *Grand Trunk Ry. Co.*, 329.

FENCES.

Right of Way — Default — Penalty — Railway Act, sec. 254.] — Where a railway was built and not fenced for many years through a thickly settled, highly cultivated and rich agricultural district, the Board ordered the right of way to be fenced by the railway company under section 254 of the Railway Act, and imposed a penalty of $50 a day for each day's default after the time specified in its order. *In re Board of Railway Commissioners and Canadian Northern Ry. Co.* (*Fencing Case*), 42 S.C.R 143, 10 Can. Ry. Cas. 104, followed. *Municipality of Nutana* v. *Canadian Northern Ry. Co.*, 11.

Duty to — Unenclosed Lands — At Large on Owner's Lands — Negligence.]—*See* ANIMALS, 1.

Defective — Wilful Act or Omission of Owner.]—*See* ANIMALS, 2.

In Bad State of Repair—Upkeep along Right-of-way.]—*See* ANIMALS, 3.

Breach of Statutory Duty — Liability.]—*See* ANIMALS, 4.

Negligence or Wilful Act or Omission of Owner — Railway Act, secs. 294 (4, 5).] — *See* ANIMALS, 5.

FIRES.

1. *Liability — Remove Combustible Material from Right-of-way — Starting on — R.S.N.S.* 1900, *ch.* 91—*Breach of Statutory Duty.*]—(1) It is the duty of a railway, under ch. 91 of R.S.N.S., 1900, to clear from off the sides of its roadway, where it passes through woods, all combustible material, such as grass, ferns, bushes, or other material, by careful burning at a safe time, or otherwise, whenever they become combustible.

(2) Under ch. 91 of R.S.N.S. 1900, which requires a railway to clear from off the sides of its roadway, where it passes through woods, all combustible material, it is answerable for the value of property adjacent to its roadway that was destroyed by fire which was started on the roadway by sparks from engines, in an accumulation of dried grass, ferns, bushes, and turf. *Rainville* v. *Grand Trunk* 25 A.R. 242, affirmed, *sub nom. Grand Trunk* v. *Rainville*, 29

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S.C.R. 201, specially referred to. *Schwartz* v. *Halifax & South Western Ry. Co.*, 85.

2. *Spread of — Several Concurrent Fires as Cause — Proximate Cause—Cross-examination of Witness by Reference to Deposition taken on Discovery — False Impressions Drawn Therefrom — Discretion of Trial Judge.*]—(1) Where it appears that the loss by fire was occasioned by the concurrence of several fires for only one of which the defendant was liable, a refusal to put to the jury the question of what other fires were burning at the time in that vicinity and which one or more of such fires occasioned or contributed to the burning of the plaintiff's property, will not justify a new trial, where the Judge in his instructions to the jury fully covers that point.

(2) Where a witness is cross-examined by reference to his deposition taken on discovery, it is not permissible to conduct the proceedings in such a way as to give to the jury a false impression of the evidence given by the witness on discovery, and where that is attempted, the trial Judge, in his discretion, may allow the whole of the discovery evidence to be read, or permit such other steps to be taken as may be necessary to remove the false impression. (*Per* Irving, J.A.). *King Lumber Co.* v. *Canadian Pacific Ry. Co.*, 313.

GATES.

See FARM CROSSINGS, 2.

HAULS.

Longer — Demurrage — Element in Fixing Damages — Wrongful Removal of Spur Track.]—*See* COMPENSATION.

Over Two or More Lines — Tolls — Sum of the Locals.]—*See* EXPRESS COMPANIES.

Side — Toll for.]—*See* UNJUST DISCRIMINATION, 1.

Long and Short — Parity — Competition.] — *See* UNJUST DISCRIMINATION, 4.

HIGHWAYS.

1. *Railway Crossed by—Cost of Overhead Bridge — Municipality — No Compensation for Easement.*]—Leave was granted by the Board to a municipality to carry a highway over the right of way and tracks of two railways by means of a bridge where no highway existed and the development of a village had been retarded for want of a crossing upon condition that the municipality bear the whole cost of construction. An easement was granted over the right of way, with right of support by piers without payment of com-

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pensation to the railway companies. *Village of Bridgeburg* v. *Grand Trunk and Michigan Central Ry. Cos.*, 10.

2. *Crossed by Railway — Crossing of Steam Railway by Municipally Owned Street Railway — Street Senior of Railway — Cost — Installation — Maintenance and Protection — Application to Lieutenant-Governor in Council — Railway Act, sec.* 227.]—(1) Where, in point of time, a city street is senior to the tracks of a steam railway that cross it, the tracks of a municipally owned street railway which are subsequently laid across the tracks of the steam railway, are not junior thereto so as to require the whole cost of the installation, maintenance and protection of the crossing to be borne by the city, but it will be divided equally between them.

(2) An application of a street railway to cross the tracks of a steam railway company at a place where the latter crosses a city street, need not be submitted to the Lieutenant-Governor-in-Council for approval, under sec. 122 of ch. 8, of the Alberta Statutes of 1907, as to steam railways under federal control, since such application falls within sec. 227 of the Railway Act, R.S.C. (1906), ch. 37. *Edmonton Street Ry. Co.* v. *Grand Trunk Pacific Ry. Co.*, 93.

3. *Crossed by Railway—Crossings — Want of Authority — Maintenance of Track Legalized — Protection at Crossing — Railway Act,* 1888, *sec.* 187 — *Railway Act, secs.* 222, 237—9 *& 10 Edw. VII. ch.* 50, *sec.* 59 A.]—Upon an application to direct the removal of the respondent's track from a public highway, and by the respondent to legalize its maintenance under section 59 A, 222, and 237 of the Railway Act, the Board granted the respondent's application upon condition that upon the construction of a street railway upon the highway, diamond crossings should be installed and sufficient protection given at the crossing at the respondents' expense and that the movement of the steam railway upon the highway should be restricted. *City of Ottawa* v. *Grand Trunk Ry. Co.*, 185.

4. *Railway Crossed by—Municipality — By-law — New Highway — Bridge — Proper and Suitable Structure — Jurisdiction — Cost to be Borne by Municipality.*]—In dealing with an application by a municipality to direct a railway company to carry a new highway across its tracks by an overhead crossing, the Board's jurisdiction is confined to giving directions as to the structure when railway property is interfered with and upon the municipality passing a

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by-law providing a proper and suitable structure for the purpose an order will go approving of same, and in such case the whole cost of the new highway will be upon the applicant. *Mission District Board of Trade* v. *Canadian Pacific Ry. Co.*, 331.

5. *Crossed by Railway — Bridge — Railway Yard — Apportionment of Cost — Railway Grade Crossing Fund.*]—Where an application was made by a Local Improvement District for a bridge carrying the highway over railway tracks, and the limits of an adjoining city were afterwards extended so that the highway became wholly within the city limits, the Board decided that the District should not bear any portion of the cost of such bridge, that the city should contribute $5,000 of the cost for that portion of the bridge which crosses the through tracks of the railway company, who must bear the whole cost of extending the bridge across their yard, 20 per cent. of the cost of the whole bridge to be paid out of the Railway Grade Crossing Fund and the balance by the railway company. *Saskatchewan Local Improvement District No.* 161 v. *Canadian Pacific Ry. Co.*, 337.

6. *Crossed by Railway—Street Railway — Protection — Construction, Instalment, Maintenance and Operation — Apportionment of Cost — Level Crossings — Municipalities and Railways — Rights of.*]—(1) The Board granted an application by a municipality for a crossing on the highway of a steam railway by its electric street railway to save a detour of three thousand feet on condition that the applicant pay for its own construction, its own rails, and other work and the diamonds, but the cost of protection, that is, the installation of the interlocking plant, its maintenance and operation, to be borne equally by the applicant and respondent. The municipality was not estopped, and had the right to make the application under the changed conditions, irrespective of any action previously taken by the Board.

(2) The rights of municipalities to apply to the Board to open level crossings, in the public interest, are higher and should more readily be given effect to than applications of railway companies to cross highways on the level. *City of St. Thomas* v. *Michigan Central Ry. Co.*, 338.

7. *Crossed by Railway—Street Railway — Temporary and Permanent Crossing — Consent of Railway Company — Construction of Permanent Works.*] — Upon an application to have a temporary right of crossing the

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tracks of a steam railway with the tracks of a municipal electric railway made permanent, where the railway crossing was permanent, and the respondent steam railway company had originally consented to the temporary crossing and thereupon permanent works had been constructed by the municipality, the Board made no order but directed that unless there was an elimination of grade or change in the street car location a system of derails should be installed against the electric car line on account of the dangerous character of the crossing. *City of Lethbridge* v. *Canadian Pacific Ry. Co.*, 345.

User of—Right to Erect Poles on Street — Special Legislation — Control by General Statute.] —*See* CONSTRUCTION OF STATUTES, 1, 2.

Access to.]—*See* FARM CROSSINGS, 2.

Railway Upon — Additional Servitude—Increase of Traffic.] —*See* JURISDICTION OF BOARD, 3.

Repair and Maintenance — Usual Rule.]—*See* JURISDICTION OF BOARD, 7.

INTERSWITCHING.

Cars of Another Railway Company — Private Sidings — Unjust Discrimination.] — *See* EMBARGO.

JUDGE.

Discretion of.]—*See* FIRES, 2.

JURISDICTION.

Railway and Municipal Board — Orders.]—*See* TRAFFIC.

JURISDICTION OF BOARD.

1. *Works Constructed after December* 31, 1909 — *Railway Act, sec.* 137—9 *&* 10 *Edw. VII. ch.* 50, *sec.* 2.]—The Board has no jurisdiction to approve of works constructed without its leave subsequent to December 31, 1909. The statute 9 & 10 Edw. VII. (Can.) ch. 50, sec. 2, does not apply to works constructed after that date. *In re Grand Trunk Pacific Branch Lines Co.*, 12.

2. *Tolls — Refining-in-transit — Reasonableness — Increase — Onus—Relation of Tolls on Raw Material and Finished Product —Equalizing Cost of Production — Competition — Foreign Carrier — Unjust Discrimination— Geographical Advantage — Foreign Rail Routes—International Traffic.*] — (1) The Board has no jurisdiction to regulate refining-in-transit tolls except when such tolls discriminate unjustly in favour of one point against another.

(2) Where special circumstances have operated for a time, *e.g.*, effective water competition, to induce a carrier to give a low

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toll, the burden of disproving unreasonableness is not necessarily upon the carrier when the toll is subsequently increased.

(3) Carriers are not required to adjust their tolls (apart from the general question of reasonableness) in such manner as to equalize cost of manufacturing production in different sections; nor is it necessary that tolls on raw material and finished product should be so related as to tend to that result.

(4) A carrier is not obliged to meet a lower toll made by a competing foreign road and failure to meet it is not necessarily evidence of the unreasonableness of the higher toll.

(5) In considering geographical advantage as an element in toll regulation the Board must recognize existing rail conditions in Canada as it finds them, and as, *e.g.*, Wallaceburg and Montreal are practically equi-distant from Winnipeg by rail routes within Canada, Wallaceburg is not entitled to a lower toll than Montreal by reason of geographical advantage though over foreign roads its distance from Winnipeg is much shorter.

(6) The Board has no jurisdiction to regulate an international toll except in so far as the haul within Canada is concerned. *Davy* v. *Niagara, St. Catharines and Toronto and Michigan Central Ry. Cos.*, 12 Can. Ry. Cas. 61; *Dominion Millers' Association* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 12 Can. Ry. Cas. 363; *Canadian Portland Cement Co.* v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211; *British Columbia Sugar Refining Co.* v. *Canadian Pacific Ry. Co.*, 10 Can. Ry. Cas. 159, followed. *Dominion Sugar Co.* v. *Canadian Freight Association*, 188.

3. *Railway upon Highway — Compensation to Abutting Land Owners — Additional Servitude — Increase of Traffic — Owner of Land Prior to Change—Purchasers Subsequent to Change — Notice.*]—(1) The Railway Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

(2) Where a railway established a freight shed and freight shunting yard which materially increased the traffic upon that part of the railway running along a city street and injuriously affected the value of the property fronting on the street to an extent not contemplated when the grant was made many

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years previously by the municipal corporation of permission to carry the railway line along such street, the Railway Board of Canada will order compensation to be paid by the railway to such of the landowners within the territory injuriously affected as were the owners of their property prior to such change of conditions.

(3) Purchasers of property upon a street upon which a railway is operated who bought subsequently to the establishment of a railway yard and the incidental damage to the properties on that street by reason of the shunting of cars thereon, having purchased with notice of the new conditions, are not entitled to compensation in damages as are the landowners who had acquired title previous to the establishment of the railway yard. *City of Hamilton* v. *Grand Trunk Ry. Co.*, 196.

4. *Declaratory Orders—Joint Tariff — Legality of Tariff of Tolls.*]—(1) The Board of Railway Commisisoners for Canada has power upon an application by the shipper to make a declaratory order as to what is the proper tariff of tolls applicable to a certain class of goods although no consequential relief was granted to the complainant on the application.

(2) The tariffs of tolls applicable to shipments of petroleum and its productions from the United States into Canada is the "joint tariff" of January, 1907, filed with the Board to the exclusion of subsequent tariffs filed, but not sanctioned by the Board. *Canadian Oil Cos.* v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.*, 12 Can. Ry. Cas. 350, affirmed. *Grand Trunk and Canadian Pacific Ry. Cos.* v. *Canadian and British American Oil Cos.*, 201.

5. *Provincial Railway — Railway Act, secs.*, 176, 227, 229—1 & 2 *Geo. V. ch.* 11—2 *Geo. V. ch.* 49.]—The St. John & Quebec Ry. Co., a Provincial railway company having applied to the Board under sections 227 and 229 of the Railway Act for authority to connect its tracks with those of the Canadian Pacific Ry. Co. and operate its trains over them between certain points, to rearrange certain tracks of the Canadian Pacific Ry. Co., construct and operate switches from its lines at certain points, and make other physical changes.

The Board refused the application on the ground that the benefits of the provisions of the Railway Act allowing one railway company to use the lines and appliances of another can only be given to Dominion railways, and that the statutes 1 & 2 Geo. V. (1911), ch. 11, and 2 Geo. V. (1912), ch. 49, do not

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place the applicant railway under the jurisdiction of the Board. *Preston & Berlin Street Ry. Co.* v. *Grand Trunk Ry. Co.*, 6 Can. Ry. Cas. 142, followed. *St John & Quebec Ry Co.* v. *Canadian Pacific Ry. Co.*, 360.

6. *Completion of Railway — Location Plans — Approval — Opening for Traffic — Application.*]—The Board has no jurisdiction to entertain an application for the completion of a line of railway where the route map has been approved. Its jurisdiction is confined to approval of the location plans and upon application to open the railway lines for traffic when constructed. *Mervin Board of Trade* v. *Canadian Northern Ry. Co.*, 363.

7. *Railway and Traffic Bridge — Municipality — Highway — Repair and Maintenance — Usual Rule.*]—(1) The Board has no jurisdiction to decide a dispute between a municipality and a railway company as to which of them is liable for the repair and maintenance of a combined railway and traffic bridge, which ends on railway property, on both sides of a river, and whose approaches run over a municipal highway; the matter is entirely between the railway company and the provincial authorities, who aided in the construction of the bridge.

(2) The usual rule in such cases, apart from special circumstances is that the railway company is responsible for railway structures, and the municipality for structures handed over to it for municipal and highway purposes. *Municipality of Assiniboia* v. *Canadian Northern Ry. Co.*, 365.

8. *Non-existent Railway—Reconstruction — Re-open for Traffic — Facilities — Portion of Railway — Operation—Another Railway.*] — The Board has no jurisdiction to entertain an application where the wrong complained of happened ten years before the Board was constituted, nor can it compel a railway company, the successor in title of the respondent, to reconstruct and re-open for traffic, with proper facilities, a portion of its railway which has become non-existent. *Chambers of Commerce Federation* v. *South Eastern Ry. Co.*, 367.

9. *Stop-over Privileges — Discretion of Carriers—Storages—Inspection or Completion of Carload — Unjust Discrimination—Re-establishment of Former Arrangement — Tolls in and Out—Through — Joint Route — Reshipment—Railway Act, sec. 317.*]—(1) It is entirely within the discretion of the carriers to grant or withhold stop-over privileges on carload and part car-

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load shipments during its transportation to final destination at concentration points for the purpose of storage, inspection or completion of carload; therefore, where the stop-over privilege is not granted, unjust discrimination not having been established, the Board is without jurisdiction to direct that this privilege shall be given by the carrier.

(2) For a number of years carriers carried a certain fruit commodity to concentration points for storage, inspection or completion of carload and re-shipment at a reduction of one-third of the local tolls, the combination of these tolls in and out not to be less than the through toll from the first shipping point to final destination plus 2 cents per 100 lbs., and if to the concentration point a joint route had to be used, the reduction applied only to the portion of the earnings that the carrier received from the second haul or re-shipment from that point, the railways not having satisfactorily justified withdrawing the completion of carload concession and restricting the storage and inspection privileges to carloads, an order should be made directing that the former arangement should be re-established. *Simcoe Fruits and Ontario Fruit Growers' Association* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 370.

Exclusive Operation.] — *See* EXPRESS COMPANIES.

Bridge — Proper and Suitable Structure.]—*See* HIGHWAYS, 4.

Compliance with Order—Not Retroactive—Special Order.] — *See* NEGLIGENCE, 2.

Leave of — Terms of Order— Interlocking Plant — Railway Company Granted Leave to Cross Line of Another.] — *See* NEGLIGENCE, 13, 14.

Contract — Location.] — *See* STATIONS, 2.

Cartage — Railway Act, sec. 2(30).]—*See* TOLLS, 7.

See FARM CROSSINGS, 1; TOLLS, 2.

JURY.

Questions for.] — *See* NEGLIGENCE, 3.

Absence of Evidence to Support Findings — Review of Facts.]—*See* NEGLIGENCE, 4.

Inconsistency and Uncertainty of Findings—New Trial.] —*See* NEGLIGENCE, 8.

Review of Findings — Conflicting Evidence.]—*See* NEGLIGENCE, 12.

LAND OWNERS.

Compensation to Abutting — Purchaser of Land — Prior to Change—Subsequent to Change

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— *Notice.*] — *See* JURISDICTION OF BOARD, 3.

LANDS.

At Large on Owners — Unenclosed — Duty to Fence—Negligence.]—*See* ANIMALS, 1.

User—Exclusion from— Forcible Possession — Notice to Treat—Abandonment — Loss of Profit.] — *See* EMINENJ DOMAIN, 1.

Sale of — Effect of Taking Possession.] — *See* EMINENT DOMAIN, 3.

Crossings for the Convenience of Land over which Railway is Carried.]—*See* FARM CROSSINGS, 1.

LAWS.

Conflict of—Applicable Thereto — Workmen Hired in Quebec to be Employed in Quebec and Ontario.]—*See* CONTRACT.

LEGISLATIVE INTENT.

Power of Courts to Question the Reasonableness of the Enactment.]—*See* CONSTITUTIONAL LAW.

Speculation as to — Intention of Parliament.]—*See* CONSTRUCTION OF STATUTES, 2.

LIABILITY.

Breach of Statutory Duty — Fences.] — *See* ANIMALS, 3.

To Caretaker of Stock — Exemption from — Privity — Reduced Fare.] — *See* CARRIERS, 5, 6.

Breach of Statutory Duty.]—*See* FIRES, 1.

LOCATION.

Change in—Contract.] — *See* STATIONS, 2.

See STATIONS, 3, 4.

MASTER AND SERVANT.

Fellow Servant — Watchman at Level Crossing — Train Crew — Common Law Remedy — Liability for Death of Employee —Breach of Statutory Duty — Failure to Ring Bell — Freight Train Running Backwards — Railway Act, sec. 276 — Who Liable — Several Tortfeasors Contributing to Injury — Right of Widow to Recover against Railway Company.]—(1) A person employed by a railway company as a watchman at the crossing of its railway with a street railway at level is a fellow-servant with the crew of a train passing over the crossing; and, if he is killed in consequence of the negligence of the train crew, his widow cannot recover damages at common law against the railway company. *Waller* v. *South Eastern Ry. Co.*, 2 H. & C. 102; *Morgan* v. *Vale of Neath Ry. Co.*, L.R. 1 Q.B. 149; and *Lovell* v. *Howell*, 1 C.P.D. 161, followed.

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(2) Section 276 of the Railway Act, R.S.C. 1906, ch. 37, is for the protection of employees of the railway company as well as of the public, and the widow and administratrix of a watchman employed by the company at a level crossing of the railway with a street railway, who is killed in an accident caused by a breach of that section by the running of a freight train backwards over the crossing without any person on the end car to give proper warning of its approach, resulting in a collision with a street car crossing the tracks, may recover damages against the company under that section. *McMullin* v. *Nova Scotia Steel & Coal Co.*, 7 Can. Ry. Cas. 198, 39 S.C.R. 593, and *Lamond* v. *Grand Trunk Ry. Co.*, 7 Can. Ry. Cas. 401, 16 O.L.R. 365, followed.

(3) Even if it were shewn that a street railway company, as well as a railway company, might also be liable for the consequences of an accident which resulted in the death of one of the railway's employees because of the negligence of the motorman, an employee of the street railway company, that would not prevent the recovery of full damages from the railway company. *"The Bernina,"* 13 A.C. 1, and *Burrows* v. *The March Gas and Coke Co.*, L.R. 5 Ex. 67, followed. *Pettit* v. *Canadian Northern Ry. Co.*, 293.

Accident for which Employer is Liable Happening in Ontario — Law Applicable Thereto.] — *See* CONTRACT.

See NEGLIGENCE, 1, 2, 3, 4, 9, 14.

MUNICIPALITIES.

Cost of Overhead Bridge.]— *See* HIGHWAYS, 1.

Cost to be Borne by — By-law — Bridge — New Highway.] — *See* HIGHWAYS, 4.

Rights of—Level Crossings—Railways.]—*See* HIGHWAYS 6.

Highway — Repair and Maintenance — Usual Rule.] — *See* JURISDICTION OF BOARD, 7.

NEGLIGENCE.

1. *Master and Servant — Swing Bridge — Semaphore and Bridge Lights.*] — (1) Where a locomotive driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead and he ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to the negligence of the conductor and not to his own, his act of negligence in passing the sema-

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phore having expended itself when the train stopped at the water tank.

(2) The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, does not apply where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned and where the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights of the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so. *Smith* v. *Grand Trunk Ry. Co.*, 49.

2. *Master and Servant — Compliance with Order of Board of Railway Commissioners — Erections near Track—Not Retroactive — Special Order — Knowledge of Defects or Danger by Servant — Also of Statutory Duty Imposed on Master.*]—(1) A railway company which has complied with an order of the Board of Railway Commissioners, under sub-sec. (*g*) of sec. 30, ch. 37, R.S.C. 1906, requiring its water stand pipes to be placed 7 feet 6 inches from the centre of its tracks, is relieved from liability to a brakeman for injuries sustained while riding on a ladder on the side of a car, by coming into contact with a stand pipe located as required by such order. *Grand Trunk Ry. Co.* v. *McKay* (1903), 34 S.C.R. 81, followed.

(2) A general order of the Board of Railway Commissioners, under sub-sec. (*g*), sec. 30, ch. 37, R.S.C. 1906, providing that thereafter no structure more than 4 feet in height shall be placed within 6 feet from the nearest rail of a railway track, and that no water stand pipe shall be placed so that there shall be less than 2 feet 6 inches between it and the widest engine cab, is not retroactive, and does not contemplate the removal of stand pipes within such prohibited distance erected under a special order of such Board permitting the C.P.R. to maintain its stand pipes at a lesser distance. *Kutner* v. *Phillips*, [1891] 2 Q.B. 267, specially referred to.

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(3) A special order of the Board of Railway Commissioners, under sub-sec. (*g*) of sec. 30, ch. 37, R.S.C. 1906, providing that water stand pipes shall be placed not less than 7 feet 6 inches from the centre of the tracks of the C.P.R., is not abrogated by a subsequent general order, not retroactive in effect, which prohibited the placing of water stand pipes so that there should be less than 2 feet 6 inches between them and the widest engine cab, so as to render the railway company liable to a brakeman who was injured by coming in contact, while riding on a ladder on the side of a car, with a stand pipe which was 7 feet 6 inches from the centre of the track, but not 2 feet 6 inches from the side of the widest engine cab.

(4) Where a statutory duty is cast upon a master in any particular work, the fact that a servant continues in that work with knowledge of its dangerous character and appreciation of the risk thereof, does not render the maxim *volente non fit injuria* applicable so as to absolve the master from liability, unless it is shewn that the servant undertook the employment not only with knowledge of the risk involved, but also of the master's statutory duty in respect thereto. (*Per* Galliher, J.A.) *Clark* v. *Canadian Pacific Ry. Co.*, 51.

3. *Absence of — Basis of Action — Master and Servant — Contributory Negligence—Coupling Cars — Questions for Jury — Equipment — Foreign Cars Interchanged — Railway Act, secs.* 261(1), 264(5), 317—*Statutory Condition.*] — (1) It is contributory negligence for a brakesman, while standing with one foot on a loose step on the side of a box car 6½ inches below the bottom thereof, and with one hand holding a rung of a ladder on the side of the car 14 inches above the bottom of the car, to attempt to open the coupling device by working the lever that operated it, the end of which was about 15 or 16 inches from the side of the car.

(2) Where the jury omitted to answer a direct question submitted to them on the trial of a railway employee's action against the railway for damages for negligence causing personal injury as to whether there was negligence on the part of the plaintiff or of the defendant company or of both, their negative answer to another question as to whether the car was reasonably safe for the employees, while latter question was not directly pointed at the alleged defects leading to the injury, is not alone a finding of negligence and is insufficient to support a verdict for plaintiff.

(3) Sub-sec. 5 of sec. 264 of the Railway Act which requires

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"all box freight cars of [a railway] company" to be equipped with outside ladders on the ends and sides thereof, applies only to cars owned by the defendant company and not to those of a railway company operating in the United States, that were received by the defendant in interchange of traffic under sec. 317 of the Railway Act.

(4) A verdict for the defendant should be directed where the evidence shews that the plaintiff, a brakesman in the former's employ, received an injury as the result of his own carelessness while attempting to couple cars, and not as the result of the absence of a ladder from the end of a car that, in the interchange of traffic, under sec. 317 of the Railway Act was received by the defendant from and was owned by a railway company operating in the United States, which was not shewn to be under any obligation, statutory or otherwise, to maintain ladders on the ends as well as the sides of its box freight cars.

(5) Notwithstanding that sec. 261 (1) of the Railway Act requires every railway company to provide cars with couplers coupling by impact, that can be uncoupled without the necessity of men going between the ends of cars, the fact that a car, which in the interchange of traffic, under sec. 317 of the Railway Act was received from and was owned by a railway company operating in the United States, had an operating lever on its coupling device which was shorter than those on cars owned by the defendant, is not a defect so as to render the defendant liable for injuries sustained by a brakesman while attempting to couple it, since cars with short levers were constantly being received and passed in the ordinary course of inspection.

(6) The fact that a box freight car was not equipped with ladders at the ends as required by sub-sec. 5 of sec. 264 of the Railway Act, will not render a railway company liable for injuries sustained by a servant while attempting to couple cars, where the absence of such ladder was not the contributing cause of such injury.

(7) A verdict for the plaintiff for injuries received while in the employ of a railway company cannot be sustained where neither the evidence nor the answers of the jury to questions submitted them disclose, on the part of the defendant, negligence that contributed to the plaintiff's injury. *Stone* v. *Canadian Pacific Ry. Co.*, 61.

4. *Master and Servant — Engineer Running a Snow Plough — Workmen's Compensation Act, R.S.O.* (1897), *ch.* 160 — *Common Law — Appeal — Review of Fact —Absence of Evi-*

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dence to Support Jury's Finding — Fixing Liability — Death of Sectionman on Snow Plough — Unqualified Signalman — Proximate Cause—Violation of Rules.]—(1) A case for compensation under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, but not a case at common law, is shewn where an engineer in charge of a locomotive propelling a snow-plough ran it for some time without ascertaining why crossing or station signals were not being given by the signalman on the plough, and a collision with another train resulted, in which the fireman of such locomotive was killed.

(2) A railway company is not liable at common law for the death of the fireman of a locomotive that was propelling a snow-plough, as the result of a collision with another train, due to the negligence of the engineer in charge of the engine in continuing to run it without attempting to learn the cause of the failure of the signalman on the plough to give crossing and station signals, where no negligence on the part of the signalman was shewn as the engineer whose negligence caused the accident was the deceased's fellow-servant.

(3) A verdict of a jury in favour of the plaintiff in an action against a railway company for negligently causing the death of the fireman of a locomotive that was propelling a snow-plough, cannot be sustained where there was no evidence tending to support the jury's finding that his death was due to the negligence of the railway company in operating the plough under a defective system by placing it in charge of a servant who had not passed the necessary eye and ear test, or to shew that the accident was due to a defect in the hearing or vision of such person.

(4) A railway company cannot be held liable for the death of a sectionman on a snow-plough train as a result of a collision, merely because it employed an unqualified signalman on the snow-plough, where it did not appear that an accident was the result of his disqualification.

(5) In order to entitle the plaintiff to recover from a railway company for negligently causing the death of a locomotive fireman as the result of a defective system of operating a snow-plough, which was being propelled by the locomotive at the time of the accident by placing a signalman on the plough who had not passed the necessary eye and ear test, and an examination as to train rules, it must appear that such negligence was the proximate cause of his death. *Jones* v. *Canadian Pacific Ry. Co.*, 76.

5. *Street Railways — Duty of — Usual Stopping Place —*

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Running Past Stationary Car.] —(1) A passenger who had just alighted from a street car which was followed by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom and habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track where she was struck by a car which was negligently run past the stationary car.

(2) The negligence of the defendant street railway company was sufficiently shewn as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track. *Brill* v. *Toronto Ry. Co.*, 13 O.W.R. 114, distinguished. *Cooper* v. *London Street Ry. Co.*, 91.

6. *Brakeman — Tracing Cars — Evidence — Presumption — Etsablishing Knowledge — Acquiescence — Duty to Trespasser — Speed of Train — Railway Yard.*] — (1) A brakeman who was employed by a railway company other than the defendant, cannot recover for injuries sustained by being struck by a train where, without the knowledge or leave of the defendant, he was in its yard looking for cars that might be delivered to his master in due course, so as to, for his own convenience, expedite their disposal, when received, since no breach of any duty owed him by the defendant was the cause of his injury.

(2) Permission of a railway company to a brakeman of another company to enter its yards to look for cars that might be delivered his master in due course, so as to, for his own convenience, facilitate their disposal

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when received, cannot be inferred from the testimony of the plaintiff that he had done so for several months in the night-time, or from the testimony of a servant of the defendant that he had "seen them come out different times," since it was not sufficient to shew knowledge on the part of the defendant of the plaintiff's conduct, much less to establish acquiescence therein sufficient to amount to leave or right to do so.

(3) A brakeman of a railway company other than the defendant cannot recover for injuries sustained while, for purposes of his own, he was in the defendants' yard, by being struck by a train that gave all statutory warnings of its approach, where the plaintiff stated immediately after the accident that he saw the train coming but supposed that it was on a track different from that near which he was standing and where no peculiar circumstances are shewn to require a lessening of speed in the yard below that permitted by statute. *Cunningham* v. *Michigan Central Ry. Co.*, 96.

7. *Teamster Unloading Cars—Non-repair of Roadway.*] — Where one is injured by the want of repair of a road in the station yard of a railway company, and the road is one which is used by the public openly and constantly as a road for teams, and there is no notice or other indication that it is not intended to be so used, the fact that the company has provided another road in good repair which might have been used, is no defence, in the absence of contributory negligence, to an action for damages for such injuries. *Thompson* v. *Grand Trunk Ry. Co.*, 99.

8. *Ultimate Negligence—New Trial—Inconsistent and Uncertain Findings of Jury — Personal Injury — Street Railways —Collision with Vehicle.*]—(1) In a personal injury action arising from a car colliding with a rig, where the jury finds (*a*) that by reasonable care plaintiff, had he seen that he had sufficient time to cross the tracks, could have avoided the accident; (*b*) that by reasonable care defendant's motorman had he applied the brakes when he first noticed plaintiff heading across the tracks could have avoided the accident; (*c*) that the accident was caused by negligence of *both* plaintiff and defendant, such findings are inconsistent and uncertain and a ground for a new trial.

(2) In a personal injury case arising from a street car colliding with a rig, where the jury upon their first return into Court found under one question that after defendants' motorman saw that the plaintiff was

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about to drive across the tracks the motorman could *not* by reasonable care have avoided the accident, while finding under another question that the motorman was guilty of negligence in waiting too late before applying the brakes, and while finding under a third question that the motorman was negligent in not applying the brakes when he first noticed the plaintiff heading across the tracks, and where, upon proper comment by the trial Judge on such contradictory findings, the perplexed jury struck out the answers to the two questions first mentioned still leaving doubt as to what they meant by the answer to the third question, such findings are vague and ambiguous and a ground for a new trial.

(3) In a personal injury case arising from a street car colliding with a rig, where the trial Judge submits the question of ultimate negligence, but the jury did not deal with it (or there is doubt as to whether they did deal with it), even in a case where, upon unravelling confused jury findings, the effect may be that both were to blame and that the motorman after he saw the plaintiff in danger could not have stopped the car, but there is no finding by the jury as to whether the motorman could by reasonable diligence have avoided the accident *after* he should have known that the plaintiff was about to cross in front of the car, and where the finding at most is that the motorman could not have stopped the car after he *saw* (not might have seen) the plaintiff, such findings are incomplete and ground for a new trial to the plaintiff if there was evidence before the jury sufficient to support a finding, had there been one, of ultimate negligence on the part of the defendant.

(4) Where the result of jury findings and of what takes place at the trial with reference to their answers and to questions put by trial Judge (both written and oral) leaves uncertainty as to what they meant, a new trial will be granted. *Herron* v. *Toronto Ry. Co.*, 124.

9. *Master and Servant—Swing Bridge—Semaphore and Bridge Lights.*]—(1) Where a locomotive driver ignored and passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead, and the conductor signalled him to go ahead, and he, still ignoring the semaphore, ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water

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and the engineer was drowned, his death was due to his own negligence. *Smith* v. *Grand Trunk Ry. Co., ante* p. 49, reversed; *Smith* v. *Grand Trunk R. Co.,* 3 O.W.N. 379, affirmed.

(2) The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, is applicable where an engine driver passed a semaphore which was against his train proceeding, and stopped at a water tank until he had filled his engine, when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned, although the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights on the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so. *Smith* v. *Grand Trunk Ry. Co.,* 3 O.W.N. 379, affirmed; *Smith* v. *Grand Trunk Ry. Co., ante,* p. 49, reversed. *Smith* v. *Grand Trunk Ry. Co.,* 300.

10. *Correctness of Instruction — Modification of Instructions —Desisting Against One of Defendants — Street Railways — Operation — Rate of Speed — Municipal by-law — Duty to Use Care.*]—(1) Where, in a jury trial of an action for negligence against a street railway company and a municipal corporation, the plaintiff desists from his action as against one of two defendants jointly sued in damages and the trial Judge thereupon modifies the assignment of facts to be submitted to the jury, no prejudice is suffered by the remaining defendant if the assignment of facts as modified allows the jury to find the accident was due either to the negligence of the plaintiff, or to that of the defendant or to that of neither of them.

(2) Where a municipal by-law fixes a limit of speed, *e.g.,* eight miles an hour for the street cars of a company, such company is not thereby authorized to run its cars at such maximum speed regardless of conditions and circumstances; hence a speed of not more than five or six miles an hour may be imprudence on a dark, rainy night on slippery rails and on a dimly lighted street, and if such car causes injury to a person crossing at the intersection

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of streets the company will be liable in damages. *Montreal Street Ry. Co.* v. *Conant*, 305.

11. *Street Railways—Rear End Collision — Failure to Observe Rules — Loss of Original — Accuracy of Copy—Witnesses—Refreshing Recollection—Notes.*]—(1) Where it appears from plaintiff's own evidence that he was familiar with a rule of the railway company calling for a five minute interval between cars and he, as motorman of a car, failed to obesrve that rule, which failure on his part caused a collision with a car ahead, a verdict by the jury in his favour will be set aside and the action dismissed on appeal. (*Per* Macdonald, C.J.A., and Galliher, J.A.)

(2) A witness may refresh his recollection from notes made by him at the time of a transaction in question and then make a statement as to the truth of that memorandum. The rule is that the memorandum proposed to be looked at must be made by the witness, or adopted as a correct account by him at or about the time when it was made. (*Per* Irving, J.A.)

(3) Where the loss of original notes of a certain transaction in question has been proved, and that a transcript thereof has been made on the following day, and that this copy was accurate, and the memory of the witness has been exhausted on the subject, he has a right to refresh his memory by reference to the copy. (*Per* Martin, J. A.). *Dynes* v. *British Columbia Ry. Co.*, 309.

12. *Duty to Open Vestibule Doors — Passenger Alighting from Moving Train — Rate of Speed—Use of Pullman for that Purpose — Jury — Review of Finding—Conflicting Evidence —Allowing Passenger Time to Alight—Starting Train Prematurely—Emergency.*]—(1) It is the duty of a railway company operating a vestibuled passenger train to open the vestibule door of the day coach at which passengers may expect to alight at their points of destination, or to direct the passengers as to the mode of exit, so that they may get off the train while it is standing at the station.

(2) Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination and the passenger in his efforts to get off the train went to the next coach to find an open vestibule from which to alight, and the train was, by that time pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for the plaintiff to attempt to

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get off, and such course on his part was not contributory negligence. *Keith* v. *Ottawa & New York Ry. Co.*, 5 O.L.R. 116, applied.

(3) Upon a question of fact, as to whether the rear vestibule and trap doors of a day car of a railway train, on which car the plaintiff was riding, were closed while the train was standing at a certain station; where the jury balances the probabilities, (*a*) on the testimony of the defendant company's conductor and brakeman for the negative and (*b*) on that of the plaintiff and a disinterested witness for the affirmative, and finds on that point for the plaintiff, such finding is within the jury's province and will not be disturbed.

(4) Where a railway company negligently closes a passenger's natural means of getting off a train, without notice to him, such company is guilty of negligence in starting the train before the passenger has sufficient time to get off by the means he adopts, provided such means be reasonable.

(5) A passenger in a day coach who finds the ordinary mode of exit at the rear vestibule closed at his destination, and who thereupon enters the adjoining Pullman car in search of an open vestibule, is not a trespasser as to such Pullman coach so as to disentitle him to damages for personal injuries received in alighting therefrom.

(6) Where the negligence of a railway company, operating a passenger train, forced a passenger into an emergency as to getting off the train at his destination, the fact that the means or method of exit which he, in such emergency, adopts, is not the wisest possible under the circumstances, does not necessarily imply contributory negligence on his part. *McDougall* v. *Grand Trunk Ry. Co.*, 316.

13. *Crossing of One Railway by Another—Leave of Board—Terms of Order — Interlocking Plant — Signalman — Hiring by One Company and Payment by the Other — Injury and Death of Servant of One Company — Liability of Company Using Service at Time of Injury.*]—(1) The Board granted the application of the Canadian Pacific Railway Company to cross the track of the Canadian Northern Railway Company upon the terms that the applicant should, at its own expense, insert a diamond in the track, provide, maintain and operate an interlocking plant including the cost of keeping a signalman in charge of the crossing. The signalman was appointed by the Canadian Northern to the satisfaction of both companies. While a Canadian Pacific train

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was approaching the crossing the signalman, being intoxicated, derailed the train killing the fireman.

(2) The Canadian Pacific Railway Company was held liable in damages for the death of its servant the fireman, because it was alone responsible for the negligence of the signalman, who, at the time of the accident, while adjusting the points and giving the signals for its train, was to be regarded as a person in its employment.

The whole circumstances of the employment must be looked at and the real effect of the actual relation existing must not be lost sight of in deference to a formula about hiring and paying. *Hansford* v. *Grand Trunk Ry. Co.* (1909), 13 O.W.R. 1184, at p. 1187, specially referred to. *Pattison* v. *Canadian Pacific Ry. Co.*, 401.

14. *Master and Servant—"Respondent Superior" — Question of Fact in Each Case—Signalman Appointed by One Railway Company — Another Railway Granted Right to Cross Line.*] —(1) The application of the rule *respondeat superior* to each particular case depends upon facts and is a question of fact. *McCartan* v. *Belfast Harbour Commissioners*, [1911] 2 Ir. R. 143, 44 Irish L.T. 223, referred to.

(2) Where a railway company applies to the Railway Board under section 227 of the Railway Act, R.S.C., ch. 37, for leave to cross the line of another railway company, and the Board, by its order giving leave to cross, directs that an interlocking plant shall be established at the crossing at the expense of the applicant company, and that the other company, whenever it desires to make use of the crossing, shall be entitled, upon notice to the applicant company, to place a signalman in charge thereof, whose wages are paid by the company, appointing him and reimbursed to it by the applicant company, the signalman so appointed is the servant of the company appointing him, and that company, and not the applicant company, is liable to a servant of the applicant company who is injured by the negligence of the signalman in passing a train of the applicant company over the crossing. [Judgment of Boyd, C. *Pattison* v. *C.P.R.*, 24 O.L.R. 482, reversed, Garrow, J.A., dissenting.] *Pattison* v. *Canadian Pacific Ry. Co.*, 405.

At Large on Owner's Lands—Unenclosed Lands — Duty to Fence.]—*See* ANIMALS, 1.

Fellow-servant — Watchman at Level Crossing — Liability

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for Death of Employee—Breach of Statutory Duty—Failure to Ring Bell — Freight Train Running Backwards.] — *See* MASTER AND SERVANT.

OWNER.

Wilful Act or Omission—Defective Fences.]—*See* ANIMALS, 2, 5.

PASSENGERS.

Alighting from Moving Train —Use of Pullman for that Purpose—Duty to Open Vestibule Doors—Allowing Time to Alight —Starting Train Prematurely— Rate of Speed—Emergency.]—*See* NEGLIGENCE, 12.

PENALTY.

For Default.]—*See* FENCES.

PLANS.

Location — Approval. —See JURISDICTION OF BOARD, 6.

PLEADING.

"Not Guilty by Statute" — Other Defences.]—*See* ANIMALS, 1.

PRODUCTION.

Equalizing Cost of—Relation of Tolls on Raw and Finished Products.] — *See* JURISDICTION OF BOARD, 2.

Cost of—Equalization.] — *See* TOLLS, 8.

PROPRIETORS.

Rights and Obligations of— Crossings for the Convenience of Lands over which the Railway is Carried.]—*See* FARM CROSSINGS, 1.

PUBLIC INTEREST.

Facilities.]—*See* STATIONS, 3.

RAILWAY COMPANIES.

Incorporated Under Dominion Parliament — Provincial Legislation — Regulating Work on Sunday — Right of Parliament to Pass.]—*See* CONSTITUTIONAL LAW.

Rights and Obligations of— Legal Servitude.] — *See* FARM CROSSINGS, 1.

Crossing of Steam by Municipally Owned Street Railway— Street Senior — Application to Lieutenant-Governor-in-Council — Railway Act, sec. 227.]—*See* HIGHWAYS, 2.

Bridge — Railway Yard — Apportionment of Cost — Railway Grade Crossing Fund.] — *See* HIGHWAYS, 5.

Rights of — Level Crossings — Municipalities.]—*See* HIGHWAYS, 6.

Consent of—Street Railway— Temporary and Permanent Crossing.]—*See* HIGHWAYS, 7.

Upon Highway — Compensa-

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tion to Abutting Land Owners — Additional Servitude — Increase of Traffic.]—*See* JURISDICTION OF BOARD, 3.

Provincial.] — *See* JURISDICTION OF BOARD, 5.

Completion of.]—*See* JURISDICTION OF BOARD, 6.

Non-Existent — Reconstruction — Portion of — Operation — Another Railway.]—*See* JURISDICTION OF BOARD, 8.

Crossing of One by Another —Signalman — Hiring by One and Payment by the Other.]—*See* NEGLIGENCE, 13, 14.

Break in Main Line — Additional Danger and Liability to Accident.]—*See* SIDINGS.

Majority of Stock in Another —Separate Corporations — Unity of Control.]—*See* TOLLS, 1.

Provincial—Powers of Directors of to Act without Authority of the Shareholders.]—*See* TOLLS, 5.

RAILWAY CROSSING.

Construction and Operation—Subway — Contribution.]—The Canadian Ontario Railway crossed under the line of the Grand Trunk Railway by means of a subway. Subsequently the Campbellford, Lake Ontario and Western Railway obtained authority from the Board to cross the C.N.O. Ry., using for that purpose the embankment of the same subway.

Held, that the C.N.O. Ry. was not entitled to receive any contribution from the C.L.O. & W. Ry. towards the expense it had already incurred in making the embankment.] — *Campbellford, Lake Ontario & Western Ry. Co.* v. *Canadian Northern Ontario Ry. Co.*, 220.

RAILWAY GRADE CROSSING FUND.

Bridge—Railway Yard—Apportionment of Costs.] — *See* HIGHWAYS, 5.

Apportionment of Cost — Steam Railway and Electric Street Railway.]—*See* SEPARATION OF GRADES, 2.

RIGHT OF WAY.

Fires Starting on—Remove Combustible Material From.]—*See* FIRES, 1.

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ROUTES.

Continuous — Provincial Legislation — Regulating Work on Sunday.]—*See* CONSTITUTIONAL LAW.

Foreign Rail — Geographical Advantage — Unjust Discrimination.] — *See* JURISDICTION OF BOARD, 2.

Joint — Re-shipment — Tolls in and Out — Through.]—*See* JURISDICTION OF BOARD, 9.

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All Rail and Lake and Rail—East and West Bound.]—*See* TOLLS, 8.

East and West Bound — Toll Basis.]—*See* UNJUST DISCRIMINATION, 6.

SEPARATION OF GRADES.

1. *Telephone Company — Installation in Subway.*] — Where a grade separation has been ordered and a city street is lowered in the public interest, so as to go under the railway line by subway, a telephone company having overhead wires on the street is not entitled to receive compensation from the railway or the municipality for the expense of moving and relocating the telephone line. *Bell Telephone Co.* v. *Grand Trunk, Canadian Pacific Ry. Cos. and City of Toronto* (*Brock Avenue Subway Case*), 14.

2. *Steam Railway and Electric Street Railway—Apportionment of Cost—Railway Grade Crossing Fund.*]—Upon an application by a municipality for an order to carry four streets over the intersecting tracks of a steam railway company, two of these streets being occupied by the tracks of an electric street railway, the Board decided that the cost be apportioned as follows:—

For the streets not occupied by the electric railway, the steam railway to contribute 75%, and the municipality 25% of the cost; for the streets occupied by the electric railway, the steam railway to contribute 60%, and the electric railway 20%, and the municipality 20% of the cost with contributions in three cases from the Railway Grade Crossing Fund of 20% up to $5,000, such cost to include the cost of depressing the tracks of the steam railway, and damages to its lands exclusive of the right-of-way. *City of Vancouver* v. *Great Northern and British Columbia Electric Ry. Cos.*, 333.

SIDINGS.

Construction of — Break in Main Line — Additional Danger and Liability to Accident — Greater Inconvenience than Convenience.]—The Board will not order railway companies to put in sidings every three or four miles between stations six or seven miles apart. *Pheasant Point Farmers* v. *Canadian Pacific Ry. Co.*, 13.

Private — Interswitching — Unjust Discrimination.] — *See* EMBARGO.

STATIONS.

1. *Regular and Flag — Agent — Accommodation—Caretaker.*] —After stations with regular equipment had been maintained

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at French and Rutter, six miles apart, from 1908 to 1911, Rutter was made a flag station, part of the business was transferred to French, the agent removed and a night operator left in his place.

Upon complaint by residents (representing that a population of 2,500 was dependent upon the station) the Board upon the report of its inspector ordered the railway company—

(1) To keep a caretaker at the station to look after freight, express and mail matter, at the station from 7 a.m. to 6 p.m. daily except Sunday.

(2) To see that its conductors sold tickets to people boarding trains at Rutter, and their baggage checked without charge, and condemned the practice of leaving freight and express matter in open sheds at flag stations.

Per Mr. Commissioner McLean.

(1) The railway company had not justified the removal of the agent.

(2) The general policy laid down in the Flag Station Case, 8 Can. Ry. Cas. 151, has not been modified.

(3) By order No. 6242 railway companies are released from liability for goods unloaded at flag stations where there is no agent. *Rutter Station Patrons* v. *Canadian Pacific Ry. Co.* (*Rutter Station Case*), 1.

2. *Location of — Change in — Contract — Jurisdiction.*]—(1) After approving the location of a station upon a certain lot the Board will not approve another location of the same station upon a different lot when the railway company has refused to carry out its original contract with the owner of the first lot.

(2) The Board of Railway Commissioners, on fixing the location for a railway station on the Transcontinental Railway at one of two conflicting sites proposed by representatives of settlements closely situated to each other and bearing similar names, will not restrain the location of a second station at the other site on the application of the railway on a case for additional facilities being made out. *Kelly* v. *Grand Trunk Pacific Ry. Co.* (*Hazelton, B.C., Townsite Case*), 15.

3. *Location — Unjust Discrimination — Facilities — Public Interest.*]—(1) In deciding between conflicting applications for the location of a station the Board should only intervene in the case of unjust discrimination between the railway company and the landowners.

(2) In deciding upon a location of a station the Board should not deal with the possible growth of a new town, but should ensure that the patrons of the railway should be pro-

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vided with proper facilities in the public interest. *Druid Landowners* v. *Grand Trunk Pacific Ry. Co.*, 29.

4. *Location.*]—The Board refused an application for an order directing a railway company to establish a station at the crossing of another railway about two miles distant from its existing station where a townsite had been located, elevators erected and a municipality organized, the usual distance between stations being eight or ten miles. *Eby et al.* v. *Grand Trunk Pacific Ry. Co.*, 13 Can. Ry. Cas. 22, followed. *Town of Forward* v. *Canadian Pacific Ry. Co.* (*Forward Townsite Case*), 377.

STATUTES REFERRED TO.

27 Vict. ch. 3 (N.B.), p. 40.
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R.S.N.S. 1900, ch. 91, p. 85.
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R.S.B.C. 1911, ch. 194, sec. 68, p. 265.
1 & 2 Geo. V. ch. 11, p. 360.
2 Geo. V. ch. 49, p. 360.

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Installation of Wires in Subway.] — *See* SEPARATION OF GRADES, 1.

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Status of Party Attacking Proceedings—Service of Notice.] —*See* EMINENT DOMAIN, 3.

TOLLS.

1. *Fixing — Railway Company, Majority of Stock in Another — Separate Corporations and Officers — Unit in Control.*]—Where one railway company owning 51 per cent. of its stock has *de facto* control of another railway company, although they are separate corporations with a separate set of officers, the two companies for the purpose of fixing tolls should be treated as one company. *Wylie Milling Co.* v. *Canadian Pacific and Kingston & Pembroke Ry. Cos.*, 5.

2. *Same Commodity for Different Uses — Jurisdiction.*] — (1) On further consideration of a former order allowing express companies to charge higher tolls on cream for domestic use than on cream to creameries for butter making, the Board held that such dual tolls are anomalous and inexpedient, and having already established uniform tolls east of Port Arthur on cream irrespective of its ultimate use, the Board in this case directed the express companies to install a tariff west of Port Arthur on the same principle.

(2) The Board is concerned with the correction and not primarily with the initiation of tolls. *Manufacturers' Coal Rates Case*, 3 Can. Ry. Cas. 438; *Canadian Oil Cos.* v. *Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos.*, 12 Can. Ry. Cas. 350, at p. 355, followed. *Manitoba Dairymen's*

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Association v. *Dominion and Canadian Northern Express Cos.*, 142.

3. *Telegraph — Unremunerative Business — Unjust Discrimination.*] — (1) The Board refused to order telegraph companies to provide special tolls for press service similar to tolls provided by another telegraph company under special agreement when it appeared that the objecting companies had not sought the press business or provided the necessary facilities for it and that it would be unremunerative.

(2) The Board held that an increase from 25 to 50 cents per 100 words in telegraph tolls for "press specials" in the Maritime Provinces, while the former rate of 25 cents was continued in Ontario and Quebec was *primâ facie* an unjust discrimination against the Maritime Provinces and in the absence of evidence of special circumstances justifying the difference in rate ordered the former toll to be restored. *Canadian Press* v. *Great North Western, Western Union and Canadian Pacific Railway Telegraph Cos.*, 151.

4. *Freight — Rebate — Agreement — By-laws to Fix — Approval of Lieutenant-Governor-in-Council.*] — *Held,* the rebate agreement upon freight tolls between a railway company and a forwarder, made in the absence of a by-law or of a resolution of the shareholders of the company at a general meeting and approved by the Lieutenant-Governor-in-Council, violates the prohibition embodied in section 6607 and following R.S.Q. 1909, is consequently null and void and leaves the forwarder without redress. *Kennedy* v. *Quebec & Lake St. John Ry. Co.*, 153.

5. *Provincial Railways — Freight — Rebate Agreement — Power of Directors of Railway Companies to Act without the Authority of the Shareholders.*] —*Held* (1), an agreement between a provincial railway company and a shipper whereby a *rebate* is allowed upon freight tolls is not a violation of art. 5172 R.S.Q. 1888, art. 6607 *et seq.* R.S.Q. 1909, unless it entails an undue preference or advantage. Hence, if entered into for special reasons, *e.g.*, the obligation of the forwarder to ship all his products over such railway, to himself pay the cost of loading and unloading, etc., the agreement is presumed to be lawful, until it is shewn to conceal an injustice.

(2) The directors of the company, without being specially authorized thereto by the shareholders, have the power and capacity to enter into the aforesaid agreement. *Kennedy* v. *Quebec & Lake St. John Ry. Co.*, 161.

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6. *Regulation of — Adjustment — Increase — Reasonableness — Through — Proportional — Foreign and Canadian Carriers.*] — (1) It is a well-established principle of toll regulation that where a business has been built up relying upon a particular toll adjustment, an increase in this toll adjustment should not be made without amply sufficient reasons.

(2) The toll on pressed brick from Bradford, Pennsylvania to Windsor, Ontario, formerly $1.60 was increased to $2.00 per ton. Under the former toll the Grand Trunk received 88 cents as its proportion and the B.R. & P. (United States carrier) 72 cents. Under the new rate the Grand Trunk received an increase of 32 cents and the B.R. & P. of 8 cents. Upon complaint being made of the increase in toll, *held*, that in the absence of evidence shewing any increase of cost to justify the increase of 32 cents in the toll from Bradford to Windsor the 88 cent division of the through toll which formerly prevailed should be re-established by the Canadian carriers as a proportional limited to brick ex Bradford and Bradford points for furtherance. *Metropolitan Paving Brick Co.* v. *Ann Arbor Ry. Co.*, 17 I.C.C.R. 197, referred to. *Cadwell Sand and Gravel Co.* v. *Canadian Freight Association*, 172.

7. *For Cartage —Increase — Jurisdiction — Railway Act, sec.* 2(30).]—Although cartage companies *per se* are not under the jurisdiction of the Board, the charge made for cartage by railway companies is a toll under sec. 2(30) of the Act, and must be approved by the Board.

The tariff of tolls filed by the railway companies increasing the tolls for cartage to the shipping public from two cents a hundred and fifteen cents for smalls to three cents and twenty cents, respectively, was amended by the Board to two and a half cents a hundred, and the present toll on smalls continued.

The increase was approved on account of the advance in the cost of horses, wages and feed during the last few years. *In re Cartage Tolls*, 372.

8. *Canada and a Foreign Country — Comparison — All Rail and Lake and Rail—Routes Competition — Unjust Discrimination — East and West-bound — Reduction — Cost of Production — Equalization.*]—(1) The Board not having any jurisdiction over the tolls charged in a foreign country, no comparison can be made between them and those in Canada for the transportation of the same commodity.

(2) The tolls for the lake and rail route being on a competitive basis and the all rail route east-

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bound having the advantage of one cent over the rail portion of the route westbound to Winnipeg there was no unjust discrimination.

(3) The Board is concerned with seeing that tolls are on a relatively equal basis. It is not its function to equalize costs of production and upon the evidence a case for reduction in tolls was not made out. *Canadian Portland Cement Co.* v. *Grand Trunk and Bay of Quinte Ry. Cos.*, 9 Can. Ry. Cas. 211, followed. *Imperial Rice Milling Co.* v. *Canadian Pacific Ry. Co.*, 375.

Sum of the Locals — Latitude in Regulating — Over Two or More Lines.] — *See* EXPRESS COMPANIES.

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TRAFFIC.

Interchange — Compulsory — Railway Act, 6 Edw. VII. ch. 30 (O.) sec. 57(4, 6)—Orders of the Railway and Municipal Board — Jurisdiction — Municipal Owned Railway.] — (1) Sub-section 4 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, ap-

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plies only to railways actually in existence and operation at the time of the application to the Ontario Railway and Municipal Board thereby provided for, and there is no difference in this respect when the railways in question, or any of them, are street railways.

(2) Where under sub-section 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Railway and Municipal Board makes an order declaring that section 57 shall apply to two railways, as to one of which it has jurisdiction to make such an order, but not as to the other, the intention being to bring about an interchange of traffic between them, the Court of Appeal will not strike out that part of the order which is beyond the Board's jurisdiction and let the remainder stand, when the effect of so doing would be to name a different order from that which the Board intended to make, and, in fact, made.

(3) Upon the proper construction of sub-section 6 of section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, the Ontario Railway and Municipal Board has power only to declare that that section shall apply to a particular railway, without any limitation as to the railways with which such railway may thereby become liable to interchange traffic, but such a declaration does not restrict the power of the Board to refuse subsequently to order an interchange of traffic between such railway and any other railway, or to impose such terms of interchange as it may see fit. (*Per* Magee, J.A., Meredith, J.A., *contra.*)

(4) Section 57 of the Ontario Railway Act, 1906, 6 Edw. VII. ch. 30, does not apply to a railway owned by a municipal corporation. (*Per* Magee, J.A.) *In re City of Toronto and Toronto Ry. Co.*, 422.

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1. *Side-haul Toll.*] — It is not unjust discrimination for a railway company to charge a side-haul toll to points where there is no competition, although no such toll is charged to points where competition exists. *Wylie Milling Co.* v. *Canadian Pacific Ry. Co.*, 8.

2. *Tolls — Increase — Commodity.*] — The Board allowed tariffs which had the effect of cancelling commodity rates less than 5th class theretofore enjoyed for many years on rope in carload lots out of Montreal upon its appearing that Montreal was the only point in Canada where a less than 5th class rate applied and that there had, therefore, been unjust discrimination in favour of Montreal against other Canadian points. *Town of Welland* v. *Canadian Freight Association* (*Plymouth Cordage Co.'s Case*), 13 Can. Ry. Cas. 140, followed. *Consumers' Cordage Co.* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 222.

3. *Stop-over Privileges—Canners — Different Localities.*]— The Board held that it was unjust discrimination to grant stop-over privileges to canners in one locality and refuse them to canners in another locality. *British Canadian Canners* v. *Grand Trunk Ry. Co.*, 346.

4. *Tolls — Commodity—Fifth Class — Higher Basis — Competition — Reduction — Reasonableness — Parity — Long and Short Haul.*]—(1) The fifth class tolls on wire fencing from Montreal, westbound being on a higher basis than the commodity tolls, on shipments moving from Ontario points eastbound, there was unjust discrimination against the Montreal manufacturer in competition with the Ontario manufacturer.

(2) The application of Montreal manufacturers for a reduction in tolls below the fifth class on shipments to points on the branches north of the main line of the Canadian Pacific, Montreal to Toronto, and north of the Grand Trunk main line, Toronto to Sarnia, was refused because all manufacturers shipping to the northern localities were subject to the fifth class, and the Board was not dealing with the reasonableness of the tolls, but with unjust discrimination against Montreal.

(3) The tolls to points midway between Montreal and Toronto and to certain points at the same distance from Montreal as others from Toronto, were placed on a parity, but to points immediately west of Mon-

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treal a reduction below fifth class was refused because the advantage of the shortness of the haul against the long haul of the competing Ontario manufacturers would result in equalizing the tolls.] *Montreal Board of Trade* v. *Canadian Freight Association*, 347.

5. *Tolls—Mileage Basis—Different Commodities — Reasonableness — Ex-lake — Reduction—Competition by Water.*] — (1) Putting the tolls on cornmeal on a mileage basis by reducing them from 17½c. to 15c. per 100 lbs., from Montreal to New Brunswick points, would be unjust discrimination against the Maritime millers, and these tolls should not be disturbed.

(2) It did not appear that there was any such essential difference between the commodities corn and wheat and oats as would justify a higher toll basis in the case of corn.

(3) It has not been shewn that either in point of water competition, or in point of conditions affecting carriage, there was such a difference of condition as to justify the discrimination between the ex-lake toll on corn and that on wheat, oats, and barley, and corn should, therefore, be given the same treatment as the latter, where an ex-lake toll on it was in effect. *Montreal Board of Trade* v. *Grand Trunk and Canadian Pacific Ry. Cos.*, 351.

6. *Tolls — Reduction — Comparison — Basis — East and Westbound — Competition.*] — An application that the alleged unjust discrimination in favour of Eastern refineries be removed and for lower freight tolls from Vancouver to all points in Alberta and Western Saskatchewan, raises the point: Is the difference in toll basis eastbound over the mountains from the Pacific Coast justifiable as compared with the toll basis from Montreal and from the head of the lakes westbound? which is part of the pending Western Rate Investigation, and a ruling will not be given on this particular in advance of the ruling on the general case. *Regina Board of Trade* v. *Canadian Pacific and Canadian Northern Ry. Cos.* (*Regina Toll Case*), 11 Can. Ry. Cas. 380, referred to. *British Columbia Sugar Refining Co.* v. *Canadian Pacific Ry. Co.*, 354.

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